TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 190

W. H. HUTTMAN, D. A. KELLEY, ROBERT H. ROGERS, *ET AL.*, APPELLANTS,

vs.

PETER McCLELLAND, Jr., J. M. McCORMICK, F. M. ETHERIDGE, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JANUARY 8, 1924.

(29,353)

(29,333)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 783.

W. H. HOFFMAN, D. A. KELLEY, ROBERT H. ROGERS, *ET AL.*, APPELLANTS,

vs.

PETER McCLELLAND, JR., J. M. McCORMICK, F. M. ETHERIDGE, *ET AL.*

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 9, 1923.

Caption.

'NITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

'leas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit begun on the first Monday in November, A. D. 1922, at Forth Worth, Texas, before the Honorable Richard W. Walker, the Honorable Nathan P. Bryan, and the Honorable Alex. C. King, Circuit Judges.

W. H. HOFFMAN et al., Appellants,
versus
PETER MCCLELLAND, JR., et al., Appellees.

Be it remembered, That heretofore, to-wit, on the 23rd day of anuary, A. D. 1922, a transcript of the record in the above styled ause, pursuant to an appeal from the District Court of the United States for the Western District of Texas, was filed in the office of the lerk of the said United States Circuit Court of Appeals for the Fifth ircuit, which said transcript was filed and docketed in said Circuit ourt of Appeals as No. 3827, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JR., *Plaintiff*,

vs. In Equity No. 8

JOHN K. ROSE, ET AL, *Defendants*.

To the Honorable the Judges of the District Court of the United States in and for the Western District of Texas, at Waco:

Peter McClelland, Jr., of the City of Los Angeles, and a citizen of the City and County of Los Angeles, in the State of California, brings this his bill against John K. Rose and Mrs. M. E. Grismer, a feme sole, citizens of the State of Texas, and inhabitants of the Western District of the State of Texas, and against Hugh McClelland, a citizen of the State of Texas and an inhabitant of the County of Hale in the Northern District of the State of Texas.

And thereupon your orator complains and says:

1. That he is the only child and is the next nearest of kin and the sole surviving heir at law of Peter McClelland, Senior, who departed this life testate in the City of Waco, McLennan County, Texas, on the 24th day of September, 1886, and he is the identical person referred to in item 4 and in other items of the will of the said Peter McClelland, Senior, as will hereinafter more particularly appear.

2. That on October 22, 1881 the said Peter McClelland, Senior, executed, declared, and published with all of the solemnities required by law his last will and testament and same is as follows:

"In the name of God, amen: I, Peter McClelland, Sr., of the county of McLennan and state of Texas, knowing the uncertainty of life and the certainty of death, and being of sound and disposing memory, do make this, my last will and testament:

"Item 1. I commit my soul to the God who gave it, trusting in His mercy, and my body to the earth from whence it came.

"Item 2. Should I owe any just debts at my death, I desire that my executors shall pay the same out of any money on hand, and, if there should be no money on hand, then out of the income of my estate, as soon as the same can be done.

"Item 3. I give and bequeath to my beloved wife, Joanna M. McClelland, should she survive me, the homestead we now occupy, in the western suburbs of the city of Waco, —the same that I purchased of Wm. Stone,—to be held used, and enjoyed by her during her natural life. I also give and bequeath to my said wife all the household and kitchen furniture, plate, tableware, pictures, ornaments, and other personal property used in and about said homestead, and also the carriages, horses, and milk cows that I may die possessed of. I also give and bequeath to my said wife the sum of one hundred and fifty dollars per month, or so much thereof as she may see fit to use, during her natural life, should she survive me, to be paid to her in monthly installments, for her support and maintenance, by my executors hereinafter named, in cash, from the date of my death, which shall be a charge upon my estate.

"Item 4. I give and bequeath to my beloved son, Peter McClelland, Junior, should he survive me, all the residue of my estate, real, personal, and mixed, to be received, however, and enjoyed by him only in future, upon the terms,

conditions, incumbrances, trusts, and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of my said son during the said period of twenty-five years, should he live so long.

"Item 5. I also give and bequeath to my said son, Peter, one hundred dollars per month, to be paid to him from and after the date of my death, in cash, for his maintenance and support, in monthly installments, so long as he shall remain single, or until he shall come into possession of my estate as herein provided; but, should my said son marry before or after my death, this special legacy shall be increased to one hundred and fifty dollars per month from and after the date of such marriage, to be paid to him in cash, in monthly installments, for his maintenance and support after my death, by my executors, as herein provided, which shall be a charge upon my estate until he comes into the possession of same as herein provided, or dies; and in case of such marriage my executors shall provide, by purchase or otherwise, for my said son, Peter, out of my estate, a suitable house for him to live in, including lots, grounds, and outbuildings, without charge to him, not to exceed in value the sum of five thousand dollars, if purchased by said executors for his use and enjoyment; but upon the death of my said wife, Joanna, my said son, Peter, first having so married, may, at his option, move into, live at, and enjoy the homestead bequeathed to her during her life, free of charge, in lieu of any other provisions for a home, until he shall come into the possession of my estate according to the provisions of this will.

"Item 6. I hereby appoint John E. Gilbert, Chas. F.

Gilbert, and Amos W. Gilbert, citizens of the county of McLennan and State of Texas, my executors to carry out the terms and execute the trusts provided for in this will; and as I repose full confidence in their honesty, fidelity and ability, I desire that no bond shall be required of them. Should any one of my said executors leave the state of Texas and remain away for more than two years at one time, he shall thereupon be disqualified from further acting as such executor; and in that event, or if any executor is disqualified to act from any other cause, or if there be a vacancy caused by death or other cause, any two of my other executors may appoint a third, and fill such vacancy by appointment in writing, to be filed among the records of the county court of McLennan county, with the papers pertaining to the probate of my will; but, should two or more vacancies occur at one time, then the county court of McLennan county shall appoint an executor or executors with the will annexed, to carry out the trusts herein provided for, which executor or executors so appointed, with such original executor as may be then acting, shall be required by said court to give bond in due form of law. The absence of all the executors from the state of Texas at one time for more than six months, or the absence of two of them at one time for more than one year, shall disqualify those so absenting themselves, and the court shall then appoint others as herein provided.

"Item 7. Upon my death it is my desire that my said executors, or either of them, have this will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as herein provided. If at my death it should appear that any of the above-named executors have died before me, or if, from any cause, they,

or either of them, are disqualified from accepting and executing the trusts herein provided for, then such vacancies shall be filled as above provided for.

"Item 8. Upon my death, and after the probate of this will, as aforesaid, my said executors accepting and qualified to act, as aforesaid, are hereby authorized and empowered to take possession of my entire estate, whether in money, real estate, personal or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms, and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long; and at the expiration of twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal, or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same; but should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges, and incumbrances herein created, according to the laws of the state of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living.

"Item 9. It is my desire that my executors shall collect the rents promptly on my rent-paying real estate, and that they shall collect also all other incomes of my estate, from any and all other sources, from the date of my death, during the continuance of the trusts herein provided for, for the said period of twenty-five years, and that they will pay out of such income all taxes that may become due; that they will insure and pay for same, all the buildings on the real

estate belonging to my estate; that they will pay all legacies, bequests, and charges upon my estate herein created and provided for, and will pay all other charges that may become necessary to preserve and protect said estate, in their judgment; that they will prosecute and defend suits, if necessary, to protect said estate, pay all such costs and charges as may be necessary in their judgment, and may employ and pay counsel for litigation and advice in the preservation and care of said estate, or in making investments of the income of the same, as in their judgment may seem best for the interest of my estate. And in case repairs become necessary, or ordinary improvements calculated to retain renters or increase the rents of the estate, they shall make the same as in their judgment may seem best for the interests of the estate. Should any building or other improvements be destroyed by fire or otherwise, they, my said executors, are hereby authorized to rebuild the same, as to them may seem best for the interests of my said estate, all of which shall be chargeable to my said estate, and payable out of the income thereof by my said executors. My said executors are authorized and empowered to retain out of all moneys coming into their hands from the income of said estate, or other sources, five per centum upon the gross receipts, as a compensation for their care of same, and for executing the trusts herein provided for.

"Item 10. After the payment of said legacies and charges aforesaid as they may accrue and become due, it is my desire that the residue of the income of my estate, as it accrues, shall be deposited in the State Central Bank, doing business in the city of Waco, if it be then in business, of which I am a stockholder; and whenever such deposits or cash on hand in the hands of my said executors, shall amount to the sum of five thousand dollars, I desire that my said executors shall purchase capital stock of said State

Central Bank, and hold the same as assets of said estate, collecting dividends as the same may be declared, and re-investing whenever the said sum of five thousand dollars may be on deposit or in hand for the credit of my estate as aforesaid. But my said executors are especially authorized and empowered to invest the surplus income of my said estate in government securities, or in rent-paying real estate, as in their judgment may seem best for the interests of said estate, or they may invest in unimproved real estate in the county of McLennan, or city of Waco, in the state of Texas, and may improve the same, or may improve any unimproved property of the estate, as may seem best to them, in their judgment, for the interests of the estate.

"Item 11. All other wills or parts of wills, or codicils to the same, heretofore made by me, are hereby revoked.

"In testimony whereof I have hereunto set my hand this the 22d day of October, A. D. 1881, and declared this to be my last will and testament.

P. McCLELLAND.

"Signed and executed in the presence of the following witnesses, who sign and witness the same in the presence of the testator and of each other, and at the testator's request.

J. T. WALTON.
JNO. T. FLINT."

3. That thereafter the said Peter McClelland, Senior, on to-wit: August 17, 1886, duly executed, declared, and published with all of the solemnities required by law a codicil to his aforesaid last will and testament, and same is as follows, to-wit:

"Codicil in lieu of items sixth and seventh of the foregoing will:

"(1) I, Peter McClelland, Sr., now here revoke clause

(item 6) sixth of my foregoing will, executed and dated on the 22d day of October, A. D. 1881, and now here appoint John E. Gilbert and William L. Prather, citizens of the county of McLennan and state of Texas, my executors to carry out the terms and execute the trusts provided for in my said foregoing will; and as I repose full confidence in their honesty, fidelity and ability, I desire that no bond shall be required of them. Should either of my executors leave the state of Texas, and remain away for more than one year at a time, or fail to accept such executorship upon my death, such executor shall thereafter be disqualified from further acting as such. My estate shall not be considered vacant so long as either of said executors continue to act, but in case of death, resignation, failure to act, or of the disability of both of my said executors, then the county court of McLennan county shall appoint an executor with the will annexed to carry out the provisions of said will and trusts therein provided for, which executor so appointed shall be required to give bond as provided by law.

"(2) And I now here revoke item seventh of my will, and in lieu thereof I desire upon my death that my said executors, or either of them, have my said will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my said estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as provided in said will or herein, and this codicil now here is made a part of said will as fully as if it had been originally incorporated therein. Upon further consideration, I desire, after my death and the death of my wife, that my son, Peter McClelland, may occupy and enjoy my homestead, if he chooses so to do, but upon the condition that he first convey back to my estate the homestead I have given him on Hogan

Hill. In case he does not do so, then my homestead, upon the death of my wife, shall pass to the possession of my executors, to be administered as provided for the balance of my estate. I further desire to continue the trusts created herein in my executors for and during the natural life of my son, Peter; but, if in their judgment he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him and in said will.

"In testimony whereof I hereunto set my hand this 17th day of August, 1886, and declare it to be my last will and codicil, in presence of the subscribing witnesses hereto.

P. McCLELLAND.

"Signed in our presence, and declared by the testator, in our presence, to be his last will and codicil thereto.

JNO. T. FLINT.
D. S. WOOD.
W. N. ORAND."

4. The aforesaid will and the aforesaid codicil thereto were duly probated by the Honorable the County Court of McLennan County, Texas, on October 10, 1895. Said Court had jurisdiction to render such decree of probate, for that the said testator died in said County of McLennan, in the State of Texas, leaving an estate located and situated therein. Said decree of probate is as follows, to-wit:

"No. 4497.

"WM. L. PRATHER AND JOHN E. GILBERT,
Executors,

v.

PETER McCLELLAND, JR.

No. 4505.

Suit in District Court of McLennan County, 19th Judicial District. Consolidated and tried together.

In re. Probate of Last Will and Testament of Peter McClelland, Sr., Deceased.

"On this the 10th day of October, 1895, came on to be heard the above numbered and entitled causes, consolidated, in this Court, the same having been removed to this Court by certiorari sued out by Wm. L. Prather and John E. Gilbert, and an appeal taken by Peter McClelland, Junior, from a judgment of the County Court of McLennan County, Texas, to this Court, which judgment of said County Court was rendered on the 5th day of February, 1887, in Cause No. 1097, entitled Estate of Peter McClelland, deceased, upon the docket of said County Court; and the application of said Wm. L. Prather and said John E. Gilbert filed in said cause No. 1097 on October the 4th, 1886, for the probate of certain papers claimed to be the last will and testament of Peter McClelland, Sr., deceased, bearing date October 22d, 1881, and a codicil to said last will and testament bearing date August 17, 1886, came on to be heard and said applicants appearing by counsel and said Wm. L. Prather also appearing in person, and announced ready for trial, and the said Peter McClelland also appeared in person and by counsel and announced ready for trial, and a jury being waived, the matters of fact as well as of law

were submitted to the Court, and after hearing the testimony and the argument of counsel thereon, it appearing to the Court from the evidence that the decedent Peter McClelland, Senior, at the time of executing said last will and testament, to-wit: on October 22d, 1881, and at the time of executing said codicil, to-wit: on August 17th, 1886, was over the age of twenty-one years, and was of sound mind, and that he, the said Peter McClelland, Senior, is dead, and that four years have not elapsed since his decease prior to the application made for probate herein; and it further appearing to the Court that the said decedent had a domicile and fixed place of residence in the County of McLennan and State of Texas, to-wit: on September 24th, 1886, and that his principal property was in said McLennan County at the date of his death, and that by reason of the premises said County Court of McLennan County had jurisdiction of his estate; and it further appearing to the Court that citation had been served and returned in the manner and for the length of time required by law and that said Peter McClelland, Senior, executed said will and codicil with the formalities and solemnities and under the circumstances required by law to make them valid wills, and that neither said will nor said codicil have been revoked by said Peter McClelland, Senior; and it further appearing to the Court that said will and said codicil have been proved as prescribed by law and that Wm. L. Prather and John E. Gilbert are named as executors in said codicil and it further appearing to the Court that said Wm. L. Prather is not disqualified by law from receiving letters testamentary on said estate and that said John E. Gilbert by leaving the State of Texas and remaining away from said state for more than one year at a time, to-wit: for the term of more than five years last past, has, under the terms of said codicil disqualified himself from further acting as executor of said estate; and it further ap-

pearing to the Court that by the terms of said codicil the estate of said decedent shall not be considered vacant so long as either of the executors herein named shall continue to act:

"It is therefore ordered, adjudged and decreed by the Court that said purported last will and testament of said Peter McClelland, Senior, deceased, bearing date the 22d day of October, 1881, and said purported codicil bearing date the 17th day of August, 1886, be and the same are hereby established and admitted to probate as the last will and testament of Peter McClelland, Senior, deceased, and that the same be duly recorded in the Probate Minutes of the County Court of McLennan County, together with the application for the probate thereof and all the testimony taken upon this hearing and a copy of this decree.

"And it having been made to appear that John E. Gilbert, one of the executors named in said codicil, is no longer a citizen of the State of Texas and has left the State of Texas, and has remained away from said state for more than one year at a time, to-wit: for more than five years continuously, it is further ordered, adjudged, and decreed by the Court that said John E. Gilbert has disqualified himself under the terms of said will and codicil from further acting as such executor and that said Wm. L. Prather as sole executor under said last will and testament and codicil thereto is entitled to letters testamentary thereunder, and that such letters do issue to him upon his taking the oath prescribed by law for an executor and filing the same in the County Court of McLennan County, and it being provided in said will and codicil that no bond shall be required of the executors therein named and that no action be had in reference to the estate of said decedent in the County Court other than the probate of said will and codicil and the return of a full and complete inventory and appraise-

ment of said estate by said executors or either of them, it is further ordered, adjudged, and decreed that upon said Wm. L. Prather, executor, filing such inventory and appraisement of all the property belonging to said estate in the County Court of McLennan County, and the approval thereof by said County Court, said probate proceedings shall terminate in accordance with the provisions of said last will and testament and of the laws of the State of Texas in such cases made and provided.

"It is further ordered herein that the Clerk of this Court forthwith transmit to the Clerk of the County Court of McLennan County a certified copy of this judgment for observance by said County Court, together with certified copies of the testimony of W. N. Orand and John T. Walton, testamentary witnesses, taken and reduced to writing and verified in accordance with law on the hearing in this Court."

5. The said testator was twice married, and his second wife, Joanna, died without issue, and the testator's first wife died leaving surviving her complainant, her only child.

6. W. L. Prather was duly qualified by the said the Honorable County Court of McLennan County, Texas, on October 10, 1895 as sole and independent executor of the aforesaid last will and testament of the said Peter McClelland, Senior.

7. The said Joanna, the surviving widow of the said Peter McClelland, Senior, elected not to take under the will, and on October 10, 1895 the estate was duly partitioned, and the community interest of the said surviving widow, Joanna McClelland, was duly set aside to her, and thereupon all provisions made for her by the aforesaid last will and testament ceased to become, and have ever since been, inoperative.

8. That the said W. L. Prather immediately after qualifying as sole and independent executor, as aforesaid, increased the allowance provided for complainant by item 5 of said will to the sum of Four Hundred ($400.00) Dollars per month, which sum has been duly and regularly paid to complainant, but in other respects complainant has received nothing whatsoever from and out of the estate of the said testator.

9. The said W. L. Prather died on July 24, 1905, and thereafter, in appropriate proceedings for that purpose, the Honorable the District Court of the 19th Judicial District of the State of Texas, on to-wit: March 17, 1906, duly appointed the said defendant, John K. Rose, as trustee to act in the place and stead of the said W. L. Prather, deceased, the decree appointing the said John K. Rose as such trustee being as follows, to-wit:

"14276 and 14280.

HUGH McCLELLAND Et Al,

v.

PETER McCLELLAND.

Nos. 14276 and 14280 Consolidated. April Term, 1906 of the 19th Judicial District Court, McLennan County, Texas. August 18, 1906.

"On this day came on to be heard the above numbered and entitled cause. All parties came by their attorneys and announced ready for trial, and a jury having been waived, all matters of fact, as well as of law, were submitted to the Court, it appearing to the Court that by an order duly made heretofore, pursuant to the agreement of all parties, the above numbered and entitled causes were consolidated, the Court proceeded with the cause, and after hearing the plead-

ings, the evidence, and argument of counsel, the Court took the whole matter under advisement, and thereafter, to-wit: on this the——day of August, 1906, in open court and being well advised of the law and the facts of the case, and having fully considered the same and argument of counsel thereon, and it appearing to the Court that Peter McClelland, Sr., died in the year 1886, and left a will and codicil, which were after years of litigation finally, duly, and legally probated and established in the County Court of McLennan County, Texas, and as last will and testament on October 10th, 1895, and that W. L. Prather on the same day qualified as independent executor thereof in said Court and on the same day filed an inventory and appraisement and list of claims, and went into possession of all the property of which said Peter McClelland died seized and possessed and continued in possession thereof, and managed and controled the same outside of the Probate Court of McLennan County from that date to the date of his death on July 24th, 1905; and it further appearing to the court that on the date said Prather qualified as executor that John C. West, temporary administrator of said estate appointed by said County Court, pending the litigation over the will, turned over to said Prather all the property remaining in his hands belonging to the estate, including the sum of $34,566.60, and that at this time all of the debts of the estate had been paid and there were no claims or demands of any character whatsoever against said estate, and it further appearing to the Court that the will by its terms created an active and private express trust and conveyed to Prather as Trustee the legal title to all the property remaining in the hands of the executor after the administration of the estate to be held by him for the uses and purposes expressed by said will, and it further appearing that the duties imposed upon said Prather by the terms of the will were partly

those of an executor and partly those of a trustee, and it appearing that all his functions as executor had been performed after he had filed an inventory and appraisement of the estate, that he thereafter ceased to hold as executor in the strict sense of that term, and held said property as trustee, it then being an estate in trust, and proceeded at once to execute the trust and to discharge the duties thereof imposed upon him as trustee. And it appearing to the Court that said trustee, W. L. Prather, died on July 24th, 1905, and being of the opinion that the trust created by said will attached to the property did not expire upon the death of the said W. L. Prather and that this Court ought to appoint a trustee to carry out the terms of said trust in so far as the same were not personal on said Prather;

"And it further appearing that plaintiffs, Hugh McClelland and M. E. Grismer, herein are the lawful heirs of Peter McClelland, Sr., excluding Peter, Jr., who is excluded by the terms of the will, and that all the proceedings of the County Court of McLennan County, in Cause No. 2970, estate of Peter McClelland, deceased, Peter McClelland, administrator with the will annexed, complained of in plaintiff's application for the writ of certiorari issued herein, are null and void for want of jurisdiction in said Court, or were at least, had and done by said Court by an improper exercise of its jurisdiction, even if said County Court had any jurisdiction whatever over said estate.

"It is therefore ordered, adjudged, and decreed that all and every of the following orders made by said Court in said cause, to-wit:

"1st. The order of September the 4th, 1905, appointing Peter McClelland administrator with the will annexed.

"2d. The order dated.....,

increasing the monthly allowance of Peter McClelland to $900.00 per month.

"3d. The order of September 16th, 1905, approving the contract with Horace Pickett.

"4th. The order of November 22d, 1905, authorizing the administrator to sign a petition for paving.

"5th. The order of December 18th, 1905, approving the contract with J. W. Mitchell.

"6th. The order of March 16th, 1906, appointing Robert F. Gribble temporary administrator, ought to be, and they and each of them are hereby, annulled, set aside, and held for naught, and are hereby declared and decreed to be of no further force or effect, and the said County Court is hereby enjoined from making any further orders whatever in the said matter of the estate of Peter McClelland, deceased, or interfering in any manner with the trustee hereinafter appointed to take possession of the property known as the Peter McClelland estate, in his management of said estate or in the discharge of his duties as trustee, and it is further ordered, adjudged, and decreed that Jno. K. Rose, of the City of Waco, McLennan County, Texas, be, and he is hereby, appointed trustee to succeed W. L. Prather, deceased, as trustee under the will of Peter McClelland, deceased, and is hereby vested with all the rights, title, and powers conferred by said will upon the said W. L. Prather, the original trustee, provided that Rose shall first execute a bond in the sum of Fifty Thousand ($50,000.00) Dollars payable to the Clerk of this Court with two or more lawful sureties, conditioned that said Rose shall faithfully discharge his duties as such trustee. It is further ordered that Chas. E. Moore, Receiver, after first accounting to the Court for his administration of said property, to deliver to said Rose thereafter, all of said trust property of whatever kind remaining in his hands.

"It is further ordered that plaintiffs do have and recover of and from Peter McClelland, all costs in this behalf incurred, for which let execution issue.

"To which judgment of the Court the defendant did then and there except and gave notice of appeal therefrom in open court to our Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas."

That the said John K. Rose immediately upon his appointment as substitute trustee, as aforesaid, duly executed and delivered the required bond, and duly qualified as such substitute trustee, and thereupon entered upon the discharge of his duties as such, and as such has from and since the date of his aforesaid appointment collected, and is continuing to collect, the rents, revenues, and profits from the said estate, and he is withholding the said estate from complainant, pretending that the same is in trust and that he has the legal right to withhold the possession of said estate from complainant, and the said defendant, John K. Rose, is herein sued as such trustee.

10. That the said defendant, Hugh McClelland, is a nephew of the said testator, and the said defendant, Mrs. M. E. Grismer, is a niece of the said testator, and they, and each of them, are comprehended within the terms of "my heirs at law" as employed by the said testator in item 8 of the said will, and there may be others who are also comprehended within that designation, but they are unknown to complainant, and he is, therefore, unable to make them parties hereto.

11. The said defendants, Hugh McClelland and Mrs. M. E. Grismer, are each of them falsely asseverating that complainant is without interest in the estate of his father, the aforesaid testator, and that said estate upon complainant's death will belong to them and to such other persons,

unknown to complainant, as may also be comprehended within the aforesaid designation "my heirs at law", and complainant avers that such false asseveration casts a cloud upon his title to the said estate of the said testator, and that such cloud should be, and he here prays that the same may be, removed.

12. Complainant avers that the said estate of the aforesaid testator consists of lot 1, in block 6, at the corner of Fourth and Austin Streets, and lot 2, in block 6, situated on Austin Street, and lot 3, in block 6, situated on Austin Street, and lot 4, in block 6, situated on Austin Street and a three-fourths undivided interest in lots 6 and 7, in block 4, and known as the McClelland Hotel, and lots 10 and 11, in block 7, situated on Franklin Street, and part of lots 8, 9, 10, 11, 12, and 13, in block 75, situated on Fourth Street and 242 feet on an alley, and what is known as the Orand Home, situated on Fifteenth and Jefferson Streets, and all situated in the City of Waco, in the County of McLennan, in the State of Texas, and same being of reasonable market value in excess of Five Hundred Thousand ($500,000.00) Dollars. And in addition thereto there may be other real estate belonging to the said estate of the said testator, and in addition thereto there is belonging to the said estate of the said testator personal property, money, stocks, bonds, etc., the character and extent of which are unknown to the complainant, but all of which is well known to the said defendant, J. K. Rose, and complainant prays that the said defendant, J. K. Rose, be required to file herein a full and complete itemized inventory of all and singular the properties of whatsoever nature belonging to the said estate of the said testator, together with values, separately stated, thereof, and that complainant have with the said defendant, John K. Rose, a full and complete accounting.

13. Complainant shows that by item 4 of said will the said testator made to him a clear gift of all the residue of the said testator's estate of whatsoever character and wheresoever situate, and that all of the property embraced in this controversy constituted, and now constitutes, the residium of the testator's said estate, all other devises, legacies, and provisions made in said will having been fully discharged and eliminated therefrom. Your orator now avers that the clear gift so made to him by the said testator in said item 4 of said will was upon a condition subsequent, such condition subsequent being as set forth in item 8 of said will, to the effect that should complainant die without issue prior to the lapse of twenty-five years from the death of said testator, then the said residuary estate should go to the testator's heirs at law. That the gift so made to your orator as aforesaid was conditioned only as above stated, and that by item 8 of said will the testator's heirs were constituted executory devisees and were to take only under an executory limitation over, conditioned as above stated. And your orator avers that he, having survived the said testator for the term of twenty-five years specified in item 8 of said will, became on the expiration of said period, and to-wit: on the 24th day of September, A. D. 1911, the sole, legal, equitable, and beneficial owner of all and singular the residuary estate of the said testator, and that thereupon the executory limitation over to the defendants, Hugh McClelland and Mrs. M. E. Grismer, became forever closed and wholly extinguished, and that the said defendants, Hugh McClelland and Mrs. M. E. Grismer, on and after September 24, A. D. 1911, ceased to have any interest whatsoever in the estate of the said testator or in and under the aforesaid last will and testament of the said testator, and your orator prays a decree accordingly.

14. Your orator further avers that the clear gift so

made to him as aforesaid by said item 4 of said will, was upon a trust in the nature of a power in trust, which trust did not extend to or embrace the said estate itself or the properties thereof or thereunto belonging, but such power in trust was confined solely to the income, that is to say, the rents, revenues, etc., arising from the said estate, and neither the executors nor the trustees named or appointed by the said last will and testament took, nor did the defendant, John K. Rose, as trustee, take, nor does he hold, nor did he ever have, the legal title to any of the real properties belonging to the estate of the said testator, but that the original trustees so named and appointed in said will took, and the defendant, John K. Rose, under and by virtue of his aforesaid appointment as trustee, took, until the expiration of the aforesaid twenty-five-year period, or up and until the 24th day of September, A. D. 1911, a chattel interest in said land, for the lawful purpose of holding in trust the income of the said estate until the occurrence of the contingency specified in item 8 of such will should determine either the close of the aforesaid executory limitation over or the indefeasibility of the defeasible legal title given by said testator to your orator under said will. Your orator avers that for and during that time the trust, as it related to the income and as it by implication vested in the trustees a chattel interest in the lands, was lawful and valid, but your orator avers that upon his surviving the aforesaid twenty-five-year period and upon his defeasible legal title thereby becoming absolute and indefeasible, the aforesaid trust ceased and determined, and any qualified or conditional provision for the prolongation of such trust of such income beyond the 24th day of September, A. D. 1911, is wholly repugnant to the gift, is contrary to public policy, and is wholly void. Your orator further avers that he alone, and no other person whomsoever, is now interested in said

estate, and that a continuance of the trust of the mere increment or income of said estate would be, and could be, only for the personal aggrandizement of the trustee, and that no reason or necessity exists for the further continuance of the trust of such income. Your orator further avers that by the terms of the aforesaid codicil the said testator vested in the executors and trustees of his own selection a purely personal discretion to withhold the income of the said estate from your orator for and during his natural life. That such discretion became wholly extinguished by the death of the said W. L. Prather, the last surviving original executor and trustee who qualified under the aforesaid last will and testament, that such discretion did not survive, that same was not, and could not be, vested in the defendant, John K. Rose as substitute or court trustee, and your orator therefore avers that the contingency intervening the vesting and enjoyment of the aforesaid estate has become impossible of exercise, and that therefore there intervenes no legal obstacle whatsoever between the vesting and the enjoyment of said estate in your orator and he should, therefore, be let into said estate, and he humbly prays for a decree as against all of the defendants to that effect, with an accounting with the said defendant, John K. Rose, as trustee.

15. Your orator further avers that the said testator owed no debts other than for expenses of his last illness and burial, and that when he died there was more than sufficient money on hand to defray all such indebtedness, and that his estate consisted largely and for the most part of real property, and that all of such real property was revenue-bearing, and that the income thus produced was, both in the contemplation of the said testator and as matter of fact, more than sufficient to enable the trustees to discharge all of the trust duties incumbent upon them, and that there has never existed any necessity whatever for a resort by the trustees to the corpus of the said estate or to any part thereof.

16. Your orator avers that the said testator did not, either expressly or implied, by his aforesaid codicil revoke, repeal, alter, modify, interfere with, or cut down the clear gift made to him in item 4 of the aforesaid will, nor did he by said codicil, either expressly or by necessary implication, remove, qualify, change or alter the expressed conditions therein upon which depended the operation of the executory limitation over to the defendants, Hugh McClelland and Mrs. M. E. Grismer, and your orator avers that the aforesaid codicil was specifically confined to the revocation, alteration and substitution of items 6 and 7 of his aforesaid will, and that said codicil was in no wise designed to revoke, change, alter, or interfere with any item of said will, other than items 6 and 7, as aforesaid. And your orator further avers that he is provident and careful and is therefore entitled to have the aforesaid trust terminated and to have an accounting with the trustee, as aforesaid, and to be let into the quiet and undisturbed enjoyment of all and singular the properties of the said estate.

17. Your orator further avers that the condition upon which the trustees were qualifiedly authorized to withhold from him the enjoyment of the estate, to-wit: "but if in their judgment he is provident and careful," is void for uncertainty, and, being a condition subsequent, the gift, after your orator survived the testator by twenty-five years, became absolute.

18. Your orator further avers that if it should be held by any sort of implication that the aforesaid codicil revoked, cut down, changed or modified the gift made to your orator by item 4 of said will, then he avers that the contingency upon which the aforesaid executory limitation over provided for in item 8 of said will has become impossible, and that said executory limitation over has become forever closed

and wholly extinguished, and that your orator, being the only child and the sole surviving heir at law, is entitled to the said estate, if not under the aforesaid last will and testament, then under the statute of descent and distribution of the State of Texas.

19. Your orator here distinctly avers that by reason of the premises he is now entitled to the full, quiet, and undisturbed possession and enjoyment of the aforesaid estate so given to and vested in him, as aforesaid, but your orator avers that if he should be mistaken in this, and that if for any reason he should not now be entitled to be let into the said estate, then he avers that the said estate, subject to the trust of the income therein, is and constitutes his property and is descendable alienable, and transmissible by him, in consequence of which at his death such property will go either to his heirs at law or in accordance with any such testamentary disposition as he may make thereof, and in the alternative your orator prays a decree as against all of the defendants to that effect, together with a decree of an accounting between your orator and the said defendant, John K. Rose, as trustee. And your orator prays that the said defendant, John K. Rose, as trustee, may discover and set forth a full, true and particular account of all and singular the real and personal estate and effects of the said testator, and of every part thereof, which has been possessed by or has come into his hands, with the particular nature, qualities, quantities, and true and utmost values thereof and of every part thereof respectively, and how the same and every part thereof has been applied and disposed of, and whether any and what part thereof now remains unapplied and undisposed of, and why.

20. Your orator further prays that the alleged claim, interest, or title of the said defendants, Hugh McClelland

and Mrs. M. E. Grismer, hereinabove set forth and referred to, may be decreed to be null and void and of no force and effect, and that the cloud arising therefrom on the title of your orator and his heirs at law may be removed, and that as against all of the defendants herein it be decreed that your orator is the owner in fee of all and singular said property. And your orator prays that Your Honors may adjudge and decree that the alleged claims of the defendants and each of them are invalid and void; that the defendants have not, nor has either of them, any estate or interest in the said property or in any part thereof; that your orator is the owner in fee of said property; and that the defendants and each and every of them be forever barred from asserting or claiming any estate or interest whatsoever therein.

21. May it please Your Honors to grant unto the complainant a writ of subpoena to be directed to the said defendants, John K. Rose, Hugh McClelland, and Mrs. M. E. Grismer, in terms of law, thereby commanding them, and each of them, at a certain time and under a certain penalty therein to be limited personally to appear before this Honorable Court and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to perform and abide such further order, direction, and decree therein as to this Honorable Court shall seem agreeable to equity and good conscience, but not under oath, the same being expressly waived, the several allegations in this, your orator's bill contained.

PETER MCCLELLAND, JR.

FRANCIS MARION ETHERIDGE
JOSEPH MANSON MCCORMICK
Solicitors for Peter McClelland, Jr, Complainant.

(Endorsed as follows, to-wit:) No 8 in Equity. Peter McClelland, Junior, Plaintiff, v. John K. Rose, et al, Defendants. Complainant's Original Bill.

Filed 17th day of April, 1912 at 9:30 o'clock a. m. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

Filed 14 day of Feb., 1918. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

Filed March 28th, 1917, at————M. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

No. 8 In Equity.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JUNIOR, *Plaintiff,*

vs.

JOHN K. ROSE Et Al., *Defendants.*

To the Honorable the Judges of the District Court of the United States in and for the Western District of Texas at Waco:

Peter McClelland, Junior, files this his amended bill of complaint herein, and thereby he avers that the defendant, Mrs. M. E. Grismer, departed this life prior to the filing of the original bill herein and that complainant was at the time ignorant of that fact. That the said Mrs. M. E. Grismer left her surviving as her sole heir at law Hugh L. Grismer, who resides in the County of Coryell, in the vicinity of the City of Gatesville therein, in the Western District of Texas, and Otis McClelland, who resides near the town of McGregor, in the County of McLennan, in the Western District of Texas. Complainant therefore makes the said Hugh L. Grismer and Otis McClelland parties defendant hereto in the place and stead of the said Mrs. M. E. Grismer, deceased, the same as if they had been originally named in the original bill of complaint heretofore filed herein, and complainant prays appropriate process for the said two last named defendants, as prayed for in the original bill of complaint.

Respectfully submitted,
PETER McCLELLAND
By FRANCES MARION ETHERIDGE
JOSEPH MANSON McCORMICK
His Solicitors.

(Endorsed as follows, to-wit): No. 8 in Equity. Peter McClelland, Junior, Plaintiff, v. John K. Rose Et Al., Defendants. Amended Bill of Complaint. Filed 11 day of May, 1912, at 8:30 o'clock A. M. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

Filed 14 day of February, 1918. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

Filed March 28th, 1917. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO, TEXAS.

PETER McCLELLAND, JUNIOR, *Plaintiff,*

vs. In Equity. No. 8.

J. K. ROSE, Et Al., *Defendants.*

The joint and several demurrer of John K. Rose, Hugh McClelland, Hugh Grismer and Otis McClelland, three of the defendants above named.

I.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for the cause of demurrer showeth that the said Complainant has not in and by the said Bill made or stated any such cause as doth or ought to entitle him to any such discovery, or relief as is thereby sought and prayed for from or against these defendants.

II.

That the Bill shows on its face that John K. Rose is the duly appointed and acting Trustee of the Peter McClelland Estate, and rightfully in possession thereof.

III.

That the Bill shows on its face that the purposes of the Trust created by the will of Peter McClelland, have not been fulfilled, as it appears therefrom that the Trust was to endure for the natural life of Peter McClelland, Jr.

IV.

That said Bill shows that the Complainant has no right, title or Estate in the property of said Peter McClelland, his

only interest therein, being the right to the monthly allowance to be paid to him by the Trustee, as provided by said will.

V.

That the power gives to the original Trustee to increase said monthly allowance under the conditions therein named, is a power coupled with an interest and attached to the property of the Trust and not to the person of the Trustee, and survived the death of said Trustee, and now resides in John K. Rose, the present trustee.

VI.

If it be true, which is not admitted, but denied, that the aforesaid power to increase the monthly allowance aforesaid, died with the original Trustee, the failure of said power will not be permitted to destroy said Trust until its purposes have been performed.

VII.

That the Original Bill and Amended Bill of the Complainant, show on their face that there are other parties, viz., the unknown heirs of the testator, who are indespensible parties to this suit, as they are shown by said Bill to stand in the same relation to the property involved as the defendants, Hugh McClelland, Otis McClelland and Hugh Grismer, and this Court cannot proceed to a decree unless such persons are made parties to this bill.

VIII.

That the Bill shows on its face that the said Trust Estate of said Peter McClelland was long before the filing of this suit, by due and proper proceedings had therefor, taken charge of by the 19th District Court of McLennan County, Texas, a Court of concurrent and competent equity jurisdiction, which Court appointed said John K. Rose, Trustee, and under the directions of which it is shown he is now act-

ing, and this Court will not interfere with the said State Court in its administration of said Estate.

IX.

That the Complainant is concluded and estopped by the decree of the 19th District Court of McLennan County, Texas, appointing John K. Rose, Trustee, and declaring the nature of the Trust created by the will of Peter McClelland from raising any of the questions he attempts to raise by his pleadings in this cause. The parties being the same and the subject matter the same as in the instant case, and the conclusion shown to have been reached by said decree could not have been reached without deciding every question attempted to be now raised in this cause by the Complainant adversely to his contention.

WHEREFOR, and for divers other causes of demurrer appearing in said Bill, these defendants respectfully demur thereto and humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to said Bill, either as to the remedy or discovery therein prayed for.

L. C. PENRY
DOWNS & WEBB
RICH'D I. MUNROE
Solicitors for the defendants named.

WESTERN DISTRICT OF TEXAS,
County of McLennan.

John K. Rose makes oath and says that he is one of the above named defendants, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

JOHN K. ROSE

Subscribed and sworn to before me, this the 26th day of June, A. D. 1910.

W. T. CLIFTON

(Seal) Notary Public, McLennan County, Texas.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. R. WEBB

Of Counsel for the Defendant.

(Endorsed as follows, to-wit): In the District Court of the United States. For the Western District of Texas. Waco. Peter McClelland, Jr., Complainant, vs. John K. Rose, Et Al, Defendants. The Joint and Several Demurrer of Defendants, John K. Rose, Hugh McClelland, Otis McClelland and Hugh Grismer. Filed 1st day of July, 1912. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy. Entered O. & R. Book, Vol. 2, P. 347.

Filed 14 day of February, 1918. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

Filed March 28th, 1917. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JUNIOR, *Plaintiff*,

vs. In Equity No. 8

JOHN K. ROSE, Et Al, *Defendants*.

The joint and several answer of John K. Rose, Hugh McClelland, Hugh L. Grismer and Otis McClelland, defendants herein, to the original and amended bill of complaint filed herein, and reserving all manner of exceptions that have heretofore been filed that may be had to the uncertainties and imperfections of said original bill and amended bill, come and answer thereto, or to so much thereof as they are advised is material to be answered, and say:

1. These defendants admit the truthfulness of the allegations contained in plaintiff's amended bill, and in paragraphs Nos. 1 and 2 of his original bill, and also that the will and codicil of Peter McClelland, Sr., and the dates they were executed, declared and published are truly stated, and that said will and codicil, with their various items, are correctly set forth and copied in said original bill. They further admit the truth of the statement in paragraph 4 of said bill, and that the copy of the order probating said will and codicil, and appointing Wm. L. Prather executor of said will on the 10th day of October, 1895, is a true copy; also that the statements in paragraphs 5, 6, 7, 8 and 9 are true; and that the order appointing John K. Rose trustee to succeed Wm. L. Prather in the consolidated cases of Hugh McClelland et al vs Peter McClelland, Jr., in Nos. 14,276 and 14,280, on the 18th day of August, 1906, is correctly set

forth. But they specially deny that the appointment of a trustee by said Nineteenth District Court of McLennan County, Texas, was all that was done or sought to be done in said causes, but that in addition thereto, upon the pleadings of the parties and the evidence introduced thereunder, said court adjudicated the title and interest which this plaintiff and Hugh McClelland and Mrs. M. E. Grismer, the mother of the other defendants herein, had in the estate of Peter McClelland, Sr., and said will and codicil was construed by the court, as will more fully appear in subsequent portions of this answer, said trial court deciding that the said "Hugh McClelland and M. E. Grismer were lawful heirs of Peter McClelland, Sr., excluding Peter, Jr., this plaintiff, who is excluded by the terms of the will." It is admitted that the plaintiff herein appealed from the judgment appointing John K. Rose trustee to succeed the said Prather, and the entire judgment in said consolidated causes, including that part of it deciding that said Hugh McClelland and Mrs. M. E. Grismer were the lawful heirs of Peter McClelland, Sr., excluding this plaintiff, who is excluded by the terms of the will, which conclusion was reached by the trial court in construing the terms of said will and codicil by the issues raised in said consolidated causes. These defendants further deny that said Rose upon his appointment as trustee immediately entered upon the discharge of his duties as such substitute trustee, but did not do so until after the judgment in said cause was decided and affirmed by the Court of Civil Appeals of the State of Texas, and the Supreme Court of Texas had refused a writ of error, which was more than a year after the appointment of said Rose as such substitute trustee, and pending said appeal Charles E. Moore, as receiver, had charge of the property belonging to the estate of Peter McClelland, Sr., deceased; that said John K. Rose, under his appointment as substitute trustee,

took charge of the property of said estate on the.....day of....., 1907, and has managed it since said date, after giving the bond required by the court, and has collected, and is continuing to collect, the rents, revenues and profits from said estate, and performing his duties as he understands them to be, under the order of his appointment and the provisions of said will and codicil, and paying complainant herein his monthly allowance, which he is advised is all the interest he has in said estate.

2. These defendants admit the truth of the averments in paragraph 10 of the complainant's bill, that he, the said Hugh McClelland, and Mrs. M. E. Grismer are respectively a nephew and a niece of the said testator, and are comprehended within the terms of "my heirs at law," as employed by said testator in item eight of said will, and they state on information and belief that there are others within the same class, or their descendants, but whose names and residences are not known to these defendants.

3. The defendants Hugh McClelland and Hugh Grismer and Otis McClelland deny that they are falsely asseverating that complainant is without interest in the estate of his father, Peter McClelland, Sr., but they do claim that the codicil created a trust in the executors to continue during the life of complainant, and cut him off from all further rights in the estate, except that the executors might, if in their opinion he should become provident and careful, make further advances to him than as stated in the original will. They claim that the original will devised and bequeathed to complainant all the estate left, after paying certain legacies, at the expiration of twenty-five years after the testator's death, and that the codicil revoked this part of the will. That said will and codicil created what is known as a spendthrift trust, and that the complainant's only title or interest in said estate is the charge made against it in his favor for

his maintenance and support, and for the annuity in his favor for life, and that upon his death, without heirs of his body living, said estate will belong to them, and to such other persons as may be comprehended within the designation of Peter McClelland, Sr., as "my heirs at law," and as such heirs at law, together with others in the same class then living, will take a fee simple title to all the property, both real, personal and mixed, belonging to the estate of Peter McClelland, Sr. That they have never claimed, and do not now claim, that they have any vested title to said property or right to the possession thereof, but only a contingent interest, which will ripen upon the complainant dying without heirs of his body living at the time of his death.

4. These defendants admit that the property mentioned and described in paragraph 12 of complainant's bill is a true and correct description of the property belonging to said estate.

5. These defendants deny that the construction and interpretation placed by the complainant upon the meaning of said will and codicil, and the several items thereof, in paragraphs 13, 14, 15, 16, 17, 18 and 19 of his bill is a true, proper and legal construction and interpretation of the terms of said will and codicil, and they aver and contend that the true and legal meaning and construction of the said several sections of said will and codicil, when construed together, is as follows:

(1). By the terms of the original will the testator created a trust for accumulation, and said trust was a spendthrift trust, which vested the legal title to the whole estate in the executors for a term of twenty-five years, in the event Peter should live so long, or for the life of Peter should die before the end of twenty-five years, and devised and bequeathed to Peter the title in fee simple to the whole estate,

not absolute, but contingent upon Peter being alive at the termination of the trust, in which event the expectant estate devised to Peter was to vest in interest and possession, the remainder over upon the termination of the trust to the heirs of the testator, contingent upon the expiration of the trust within twenty-five years from the death of the testator. By the terms of the codicil to said will the testator created a fee simple absolute in the heirs at law of said testator in existence at the time of the death of his son, to take effect at the date of the death of his said son, the complainant, Peter McClelland, and continued the possession of his said estate in his executors until the death of said son; that no title to the property of said estate, or any part thereof, ever vested or was intended to vest in said Peter McClelland, Jr., and the complainant, Peter McClelland, Jr., had and could have no interest whatever in said property except as the spendthrift named in said trust entitled to enjoy during his natural life the provisions therein made for him. Such is the true construction of said will, as placed thereon by these defendants, but these defendants admit that owing to the terms of said will, even when read as a whole, the expression in said will contained in item four, conveying the idea of futurity may be construed without violence to refer only to the postponement of the possession of said estate, and not to mean, as contended by these defendants, that the title was not to vest until after the expiration of said trust: But these defendants say that if said will and codicil be construed in the light of circumstances surrounding the parties at the time the said will and codicil were made, and if the character of the parties and their relation to each other be shown, that all ambiguity, if any, disappears, and it is seen that said will and codicil have the meaning as contended for by these defendants, and can have no other meaning. Wherefore, these defendants pray the court that they be allowed to show

by parol evidence the circumstances under which said will and codicil were made, the character of the parties thereto, and their relation to each other and to said estate.

6. Answering further, these defendants say that heretofore, towit, at a regular term of the Nineteenth District Court of McLennan County, Texas, a court of competent jurisdiction, and on the 17th day of March, 1906, and at the January term thereof, in certain consolidated causes therein pending, and numbered on the docket of said court as 14,276 and 14,280, consolidated, wherein the said Hugh McClelland and Mrs. M. E. Grismer were plaintiffs, and the said Peter McClelland, Jr., complainant herein, was defendant, and for the same cause of action in the present bill of complaint said plaintiffs recovered judgment against said defendant, Peter McClelland, Jr., on the same identical contention he is here now urging in this suit, as by the records and proceedings thereof will more fully appear; that said judgment therein recovered in said court in said consolidated causes was duly appealed from by the said Peter McClelland, Jr., to the Court of Civil Appeals of the State of Texas, and by said court was in all things affirmed, and thereafter the said Peter McClelland, Jr., applied for a writ of error to the Supreme Court of the State of Texas to correct and revise any supposed error made by said Court of Civil Appeals in passing on said case, which application was refused by said court. Wherefore, said judgment of said Nineteenth District Court in said consolidated causes is still in full force and effect, and in no wise reversed, set aside or made void, and this these defendants are ready to verify by said record. It is shown that the very issue raised in this case as to the respective title, quantam and interest of the complainant and these defendants under the will and codicil of Peter McClelland, Sr., were raised by the pleadings and evidence in said consolidated causes, and it was therein decided by the

court that the said "Hugh McClelland and Mrs. M. E. Grismer were the lawful heirs of Peter McClelland, Sr., excluding Peter, Jr., who is excluded by the terms of the will." It is further shown that if there is any ambiguity in the meaning of said decree of said Nineteenth District Court in construing the interests of said parties under said will and codicil, which is not admitted, it was the intention of said court in construing the meaning of said will and codicil to construe it in the same manner in which said will and codicil had theretofore been construed by the Texas courts in the cases of McClelland vs McClelland, reported in 37 S. W. Reporter, page 35, and Wood vs McClelland, reported in 53 S. W. Reporter, page 381, in each of which cases the complainant herein was a party, and in each of which cases the construction of said will and codicil was the main issue to be determined, as raised by the respective parties in said cases, as shown by the pleadings and the evidence introduced in said causes, to all of which reference is made in this answer, and which cases were cited and approved by the said Court of Civil Appeals in affirming the judgment of said Nineteenth District Court in the consolidated causes aforesaid of Hugh McClelland and Mrs. M. E. Grismer against Peter McClelland Jr., as will more fully appear by inspection of the pleadings and evidence and findings of fact and conclusions of law in said consolidated cases. Wherefore, these defendants say that the character and quantam and quality of the interest of complainant and of these defendants, under the terms of said will and codicil, have already been determined and passed on and decided by a court of competent jurisdiction, and are res adjudicata of all such questions attempted to be raised in the suit at bar, all of which these defendants are ready to verify. That complainant's bill filed herein, to which these defendants demurred, contains only a copy of the judgment in said consolidated

cases Nos. 14,276 and 14,280, and does not contain nor purport to contain the substance or copies of the pleadings filed by the respective parties, nor the evidence introduced before the court on the trial, nor the findings of fact and conclusions of law filed by the trial judge in said consolidated causes, and these defendants aver that an inspection of them will show that the very identical questions now sought to be determined by complainant were raised by the pleadings and evidence, and argued, and decided by the court in said consolidated causes, against complainant, and in favor of these defendants. Wherefore, these defendants say that the question of res adjudicata was not raised and could not have been raised by them in their demurrer, and considered upon its merits as to the questions actually raised by the pleadings filed by them and the complainant in said consolidated causes, and the evidence introduced before the court, and which were necessary to be decided in the passing on the actual issues presented to the court and decided by it in said consolidated cases. Wherefore, these defendants pray that they be allowed to introduce in evidence parol testimony to explain any ambiguity in said judgment, and to show what was actually presented, argued and decided, and intended to be decided, when said court determined and decreed that Hugh McClelland and Mrs. M. E. Grismer were the lawful heirs of Peter McClelland, Sr., excluding Peter, Jr., who is excluded by the terms of said will.

7. These defendants, further answering, aver that even if it be true that Peter McClelland, the complainant, has an equitable title to all the estate of his deceased father, and is the owner thereof, that it cannot be true that the same constitutes his property in the sense that the same is descendable, alienable and transmissible by him, for such a right to be vested in him is incompatible with the trust, and would frustrate the plain intention of the testator; that is to say,

that the trust was to endure for the lifetime of the said Peter McClelland to protect him against his own incapacity and weakness, and to save him from the vicissitudes of fortune, as to all of which these defendants pray the judgment of the court.

8. These defendants, further answering, show that they are advised that the complainant herein is not in a position and cannot call upon the substitute trustee Rose for an accounting, for the reason that he has abandoned his contention that he is entitled to be let into the possession of said estate at this time, and the bill on its face fails to show any right in the complainant to call for an accounting, and there is no necessity for an accounting by the trustee at this time, of which judgment of the court is prayed, but in the event the court should determine that he should account he stands ready to file his account at any time the court may direct.

9. It is further shown to the court that in the following cases, Prather et al vs McClelland, reported in 26 S. W. Reporter, page 625; and in the case of McClelland et al vs McClelland, reported in 37 S. W. Reporter, page 50; and in the case of Wood et al vs McClelland et al, reported in 53 S. W. Reporter, page 381; this will and codicil in each case were before the court, and in each case the will was construed as to the quantam and extent of complainant's interest in the estate devised and bequeathed by the will. In each of said cases the complainant herein was a party, and the pleadings and the evidence in each of said cases raised the issue as to the construction of said will and codicil, and what interest, if any, the complainant herein had in the estate of Peter McClelland, Sr., and in each of said cases it was necessary for the court to decide said issue, and in each case it was held that complainant herein had no interest in said estate, except as a beneficiary of a spendthrift trust, which

charged the whole estate with a specific sum to be paid by the executors and trustee for his support. That the legal title and right of possession was in the trustee, to be held by him for the uses and purposes named in the will, until the death of complainant. Wherefore, these defendants say that the decisions in each of said cases construing said will have become a rule of property in the state of Texas, and will be followed by this court as a rule of decision. It is further shown that in the case of Sanger vs Rovello et al, reported in 173 Federal Reporter, on page 1022, said will and codicil was on appeal before the United States Circuit Court of Appeals from a decision of this Honorable Court, wherein said will and codicil were construed, and the extent of the interest of complainant herein to said estate of Peter McClelland, Sr., was therein passed on and determined, and the Texas cases above cited and referred to were cited and approved and followed, and it was therein determined that the complainant herein had no interest in said estate.

Wherefore, these defendants say that the complainant is not entitled to the relief prayed for.

L. C. PENRY
RICHARD IRBY MUNROE
J. R. WEBB
J. R. DOWNS
Solicitors for Defendants.

(Endorsed as follows, to-wit:) In Equity No. 8. Peter McClelland, Jr., Plaintiff, vs John K. Rose et al, Defendants. Defendants' Answer.

Filed 26 day of January, 1914. D. H. Hart, Clerk. By L. B. McCulloch, Deputy.

Filed March 28th, 1917 at ——————M. D. H. Hart, Clerk. By A. I. Campbell, Deputy.

Filed 14 day of Feb 1918 at ——o'clock——M. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JUNIOR, *Plaintiff*,

vs. No. 8 in Equity.

JOHN K. ROSE Et Al, *Defendants*.

In obedience to the directions contained in the Mandate of the United States Circuit Court of Appeals for the Fifth Circuit filed herein, it is ordered by the Court that the demurrers of the defendants to the Bill of Complaint herein, be and the same are now hereby overruled, to which defendant in open Court except.

Whereupon, this cause came on to be heard at this term, and was argued by counsel upon the motion of the plaintiff to strike out the answer of the defendants, and the Court, having heard and considered the same, is of the opinion that the first (1st) and second (2) grounds of said motion should be overruled, and that grounds three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13) of said motion should be sustained.

It is therefore ordered, adjudged and decreed by the Court that grounds one (1) and two (2) of said motion to strike out the defendants' answer be and the same are hereby overruled, to which ruling the plaintiff duly, in open court, excepts, and that grounds three (3), four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13) of said motion be and the same hereby are sustained, to which ruling the defendant duly, in open court, except.

And said cause then and there coming on to be further heard, the Court doth find that the allegations of the plaintiff's original bill, herein filed on April 17th, 1912, and those of his amended bill, herein filed on May 11th, 1912, are true.

It is therefore ordered, adjudged and decreed by the Court, that the plaintiff, Peter McClelland, Junior, is, subject to the trust created by the will and the codicil set forth in Paragraph Two (2) of plaintiff's said original bill, which trust is construed to postpone the possession and enjoyment of the plaintiff's said estate during his natural life time the owner in fee of all and singular the estate of Peter McClelland, Senior, which estate consists of, among other things, the following described real property, situate in the City of Waco, in the County of McLennan, in the Western District of Texas, to-wit:

Lot one (1), in Block six (6), at the corner of Fourth (4) and Austin Streets; and

Lot 2 in Block 6 situated on Austin Street, and Lot 3 in Block 6 situated on Austin Street; and Lot four (4), in Block six (6), situated on Austin Street; and

A three-fourths (3/4) undivided interest in Lots six (6) and seven (7), in Block (4) four, and known as the McClelland Hotel; and

Lots ten (10) and eleven (11), in Block seven (7), situated on Franklin Street; and,

Part of Lots eight (8), nine (9), ten (10), eleven (11), twelve (12) and thirteen (13), in Block Seventy-five (75), situated on Fourth (4) Street and twenty-two (22) feet on an alley, being what is known as the Orand Home, situated on Fifteenth (15) and Jefferson Streets;

And that the plaintiff is entitled to an account with reference to all and singular the estate of the said Peter McClel-

land, Senior, deceased, from the said defendant, John K. Rose, as Trustee.

It is further ordered, adjudged and decreed by the Court, that the executory limitation over the heirs at law, as created and provided for by Item Eight (8) of the will of the said Peter McClelland, Senior, same being set forth in Paragraph Two (2) of the plaintiff's original bill, has become and is wholly extinguished, and that the executory devisees therein named have now no interest to or claim upon the said estate of the said Peter McClelland, Senior, either in whole or in part; and,

It is further ordered, adjudged and decreed by the Court, that all and singular the properties, of whatsoever character and wherever situate, belonging to the estate of the said Peter McClelland, Senior, be and the same are hereby, subject to the trust aforesaid, vested in the plaintiff, Peter McClelland, Junior; and,

It is further ordered, adjudged and decreed by the Court, that the defendants, Hugh McClelland, Hugh L. Grismer and Otis McClelland, have no interest in or claim to the properties belonging to the said estate of Peter McClelland, Senior, deceased, or any part thereof; and,

It is further ordered, adjudged and decreed, that all claim of the said defendants, Hugh McClelland, Hugh L. Grismer and Otis McClelland, of whatsoever character, in, to, upon or against the said estate of the said Peter McClelland, Senior, deceased, or any part thereof, be and the same is hereby extinguished, and the cloud cast upon the title of the said plaintiff to the said estate by the claim of the said defendants, Hugh McClelland, Hugh L. Grismer and Otis McClelland, is hereby removed, and the said plaintiff is hereby subject to the said trust as aforesaid, quieted in his title and peace, to all and singular the properties of the estate of the

said Peter McClelland, Senior, deceased, as against the said defendants, Hugh McClelland, Hugh L. Grismer and Otis McClelland; and,

It is further ordered, adjudged and decreed that the defendant, John K. Rose, as Trustee, be and he is hereby commanded to render unto the said plaintiff, Peter McClelland, Junior, a true, full and complete accounting and discovery of all and singular the properties, of whatsoever character and wherever situated or located, of the said estate of said Peter McClelland, Senior, deceased, as well as of his administration thereof as Trustee; and to the end that such full and complete discovery and accounting may be had A. P. McCormick, Esquire, a citizen of Waco, Texas, is hereby appointed Commissioner, and he is hereby fully authorized and empowered to take testimony, to compel the attendance of witnesses and the production of documents, and to make and state unto this Court a true, full and complete inventory and description of all and singular the properties, of whatsoever character and wheresoever situated or located, belonging to the said estates of the said Peter McClelland, Senior, deceased, and to make and state, itemized in detail, a true, full and complete statement of account between the said John K. Rose, as Trustee, and the said plaintiff as owner of the said estate; the appointment of such commissioner being, as this Court now here finds, necessary and essential for that purpose. To all of which rulings the defendants, in open court, except.

It is further ordered, adjudged and decreed by the Court, that the said plaintiff, Peter McClelland, Junior, is not, as against the defendant, John K. Rose, as Trustee, entitled to the possession of the properties of the said estate of the said Peter McClelland, Senior, deceased, nor is the said plaintiff entitled to be now let into the enjoyment thereof;

and to this ruling the said plaintiff, Peter McClelland, Junior, duly, in open court, excepts.

It is further ordered, adjudged and decreed by the Court, that the said plaintiff have and recover of and from the said defendants all costs in this behalf expended, and that he have execution therefor. This February 27, A. D. 1914. To all of which decree both plaintiff and defendants except.

(Signed) T. S. MAXEY,
United States District Judge.

(Endorsed as follows, to-wit:) No 8 In Equity. Peter McClelland, Junior, Plaintiff, vs. John K. Rose et al, Defendants. DECREE. Filed 27 day of February, 1914. D. H. Hart, Clerk. By L. B. McCulloch, Deputy. Entered Eq. Journal Vol. B. page 14.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND JUNIOR, *Plaintiff*,

vs No. 8 in Equity.

JOHN K. ROSE, Et Al, *Defendants*.

To the Honorable the Judge of the District Court of the United States for the Western District of Texas at Waco:

Peter McClelland, Junior, of the City of Los Angeles, a citizen of the City and County of Los Angeles, in the State of California, leave of the court being had so to do, files this his supplemental bill herein and complains of John K. Rose and Otis McClelland, citizens of the State of Texas and inhabitants of the County of McLennan, in the Western District of Texas; and of Hugh McClelland, a citizen of the State of Texas, and an inhabitant of the County of Hale in the Northern District of Texas; and of Hugh L. Grismer, a citizen of the State of Texas, and an inhabitant of the County of Coryell in the Western District of Texas; and of Josephine Alexander and her husband, J. W. Alexander, residents and citizens of Coles County, Illinois; Stellar Arey and her husband, George Arey, residents and citizens of Caldwell County, Missouri; Nora Armstrong and her husband, Thomas Armstrong, residents and citizens of LaSalle County, Illinois; Mrs. May C. Babcock, Ollie Bennett and her husband, W. I. Bennett, Katherine Bennett and her husband, Samuel Bennett, William Brinkerhoff, Alice M. Brinkerhoff and her husband, H. H. Brinkerhoff, residents and citizens of Edgar County, Illinois; Nettie

Benbow and her husband, W. C. Benbow, residents and citizens of Washington County, Oregon; Mamie Brown, Jennie Brown, Cora Brown, Rebecca Braymer and her husband, Edward Braymer, residents and citizens of Caldwell County, Missouri; Cora Bowers and her husband, James C. Bowers, residents and citizens of Taylor County, Texas; John A. Bryant, Frank B. Bryant, J. L. Bryant, surviving wife of Alfred Bryant, residents and citizens of Cook County, Illinois; Perry Brown, a resident and citizen of Clay County, Missouri; Susie Clapp and her husband, C. C. Clapp, residents and citizens of.....County, Oklahoma; Charles W. Cline and Sam B. Cline, residents and citizens of Fergus County, Montana; Charles Cline, George V. Cline, John M. Cline, William Cline, Alvah H. Cline, residents and citizens of Edgar County, Illinois; Montervill Clinton, Inez Clinton, Ethel Clinton, residents and citizens of.....County, Missouri; Otis Clinton, William Clinton, George Clinton, C. E. Clinton, Frank Clinton, residents and citizens of Edgar County, Illinois; Josie Goodman Collins, a resident and citizen of Caldwell County, Missouri; Leona Dodge and her husband, Robert W. Dodge, residents and citizens of Jefferson County, Nebraska; Mollie Davis and her husband, Fred H. Davis, residents and citizens of Johnson County, Kansas; Elgie L. Fisher, a resident and citizen of Cook County, Illinois; Charles Goodman, Mollie Goodman, Bert Goodman, Nell Goodman, Henrietta McFall Goodson and her husband, Itys Goodson, residents and citizens of Caldwell County Missouri; Fred Goodman, Kate Goodman, residents and citizens of Coles County, Illinois; Charles Goodman, a resident and citizen of Shelby County, Tennessee; R. E. Goodman, a resident and citizen of Cook County, Illinois; William L. Gray, a resident and citizen of Vernon County, Missouri; Thomas Gray, Samuel P. Gray, residents and citizens of Harrison County, Missouri; Elizabeth Bryant Hall, a resident and

citizen of Cook County, Illinois; Ibbie Helton, a resident and citizen of Harrison County, Missouri; Eva Hollingsworth and her husband, Felix Hollingsworth, residents and citizens of Edgar County, Illinois; Harriet Hooker, a resident and citizen of Caldwell County, Missouri; Lula Huston, surviving wife of Charles H. Huston, Samuel L. Huston, Harland S. Huston, residents and citizens of..... County, Oklahoma; Mrs. E. H. Johnson, a feme sole, a resident and citizen of Brannock County, Idaho; Gallia A. Jones, a resident and citizen of Yellow Stone County, Montana; Rachel A. Kime and her husband, John O. Kime, residents and citizens of Edgar County, Illinois; Grover C. Konkler, a resident and citizen of Cook County, Illinois; W. C. Konkler, a resident and citizen of Vigo County, Indiana; Luna Helton Layson and her husband, Bert Layson, residents and citizens of Harrison County, Missouri; C. A. Lowry, Mossie Lowry, residents and citizens of Cook County, Illinois; Clyde B. Lowry, a resident and citizen of Jefferson County, Missouri; Joe D. McClelland, Samuel McClelland, W. F. McFall, Walker McFall, Mrs. E. F. Montgomery and her husband, David M. Montgomery, residents and citizens of Caldwell County, Missouri; Versa Murphy, Delbert Murphy, residents and citizens of Polk County, Arkansas Netta W. Murphy, Geo. D. Murphy, residents and citizens of Edgar County, Illinois; Don Murray, a resident and citizen of Taylor County, Texas; Edna Moehlman and her husband, Paul Moehlman, residents and citizens of Carter County, Oklahoma; R. L. Murray, a resident and citizen of Wyandotte County, Kansas; Guy Murray, a resident and citizen of Caldwell County, Missouri; Mrs. A. G. Murray and her husband, A. G. Murray, residents and citizens of.....Parish, Louisiana; Rebecca Orr and her husband, Henry Orr, residents and citizens of Caldwell County, Missouri; Grace O'Bryant and her husband, ...O'Bryant, residents and citizens of New York

County, New York; Ellen Parmento and her husband, ...Parmento, residents and citizens of Caldwell County, Missouri; N. Harriett Pearl, a resident and citizen of Gage County, Nebraska; Etta M. Perisho and her husband, W. H. Perisho, Jr., residents and citizens of Edgar County, Illinois; Ethel Quillen and her husband, W. M. Quillen, residents and citizens of.....County, Oklahoma; Minnie Raymond and her husband,..... Raymond, residents and citizens of Charles Mix County, South Dakota; Mina Rymal, a resident and citizen of Caldwell County, Missouri; Mary Stone, a resident and citizen of Jackson County, Missouri; Nellie Sherrer and her husband,.....Sherrer, residents and citizens of Potter County, Texas; Harriet Swackhammer, a resident and citizen of Edgar County, Illinois; Maude Vermillion and her husband, Arthur Vermillion, residents and citizens of Caldwell County, Missouri; Jessie Gray Wiley and her husband, Charles Wiley, residents and citizens of Harrison County, Missouri; Eugenia Witt, a feme sole, a resident and citizen of Harrison County, Missouri; Elizabeth Zimmerly and her husband, Sam E. Zimmerly, residents and citizens of Edgar County, Illinois; Mrs. Andrew Zink, Francis Zink, residents and citizens of St. Clair County, Missouri; the unknown heirs of Peter McClelland, Senior, deceased, and the unknown heirs of Margaret Jane (McClelland) Gray, Sarah (Gray) McFall, Margaret Jane (Gray) Murray, Ann (McClelland) Gray, Thomas Gray, Jr., Peter Frank McClelland, Harriett McClelland Jones, Elizabeth McClelland Rymal, Sallie Clinton, William Clinton, Hugh Clinton, Jacob Clinton, Charles Huston, Andrew Cline, Charles Murphy, James A. Goodman, William Goodman, Richard Goodman, John Goodman, Margaret Brown, Mary Goodman Bryant, Frank Bryant, John A. Bryant, Alfred Bryant and Emma Bryant Lowry, whose names and places of residence are unknown to plaintiff, a respectfully represents:

1. On heretofore, to wit, April 17, 1912, plaintiff being then, as now, a citizen of the State of California, filed in and exhibited to this court his original bill in this cause against John K. Rose, as trustee, Mrs. M. E. Grismer, a feme sole, and Hugh McClelland, citizens of the State of Texas, and thereafter, on May 11, 1912, filed and exhibited herein his amended bill of complaint, averring the death of the defendant Mrs. M. E. Grismer, and making Hugh L. Grismer and Otis McClelland parties defendant.

2. Plaintiff in his said original bill averred that he was the only child, the next nearest of kin to, and the sole surviving heir at law of Peter McClelland, Senior, who departed this life testate in the City of Waco, McLennan County, Texas, on September 28, 1886, and that the plaintiff was the identical person referred to in Item 4, and in other items of the will of said Peter McClelland, Senior; that on October 22, 1881, the said Peter McClelland, Senior, executed, declared and published, with all the solemnities required by law, his last will and testament, and same was set forth correctly and *in extenso* in said original bill, and that thereafter on, to wit, August 17, 1886, the said Peter McClelland, Senior, duly executed, declared and published, with all of the solemnities required by law, a codicil to his aforesaid last will and testament, and said codicil was set forth correctly and *in extenso* in said original bill, and it was therein averred that the aforesaid will and the aforesaid codicil thereto were duly probated by the Honorable the County Court of McLennan County, Texas, on October 10, 1895, and the decree of the probate of said will and codicil was set forth correctly and *in extenso* in said original bill; and it was therein alleged that on July 24, 1905, W. L. Prather, the sole surviving trustee under the said last will and testament and the codicil thereto, of the said Peter McClelland, Senior, departed this life, and that thereafter on, to

wit, March 17, 1906, the District Court of the 19th Judicial District of the State of Texas, duly appointed said defendant John K. Rose as trustee to act in the place and stead of the said W. L. Prather, deceased, and the said decree so appointing the said defendant John K. Rose as substitute trustee was set forth correctly and *in extenso* in said original bill, and it was further therein alleged that the said defendant John K. Rose immediately upon his aforesaid appointment as such substitute trustee did duly execute and deliver the required bond, and duly qualified as such substitute trustee, and thereupon entered upon the discharge of his duties as such, and as such has ever since the date of his aforesaid appointment collected, and is continuing to collect, the rents, revenues and profits from the said estate, and plaintiff now avers that the said John K. Rose continues to act as the duly and legally appointed and qualified substitute trustee.

The object and purpose of said original bill so filed by the plaintiff herein was to obtain a judicial construction of the said last will and testament and the said codicil thereto, and to remove cloud from title to certain specified property, consisting chiefly of certain real estate of a value in excess of $500,000 situated in the City of Waco, in the County of McLennan, in the State of Texas, same being fully described in said original bill. It was the contention of the plaintiff that the said testator, by Item 4 of said will, made to plaintiff a clear gift of all the residue of the said testator's estate, and that all of the property described in said original bill and embraced in the controversy constituted the residium of the testator's said estate, and it was the further contention of the plaintiff herein that Item 8 of said will constituted an executory limitation over in favor of the class therein designated by the said testator as "my heirs at law", same being the collateral kin of the said testator, and that said executory

limitation over had failed and become wholly extinguished because the plaintiff had survived the 25-year period, and that the contingency upon which the executory limitation over could take effect could never occur, and that by reason thereof the executory devisees took nothing under said will and that they ceased to have any interest therein, and that this plaintiff took all and singular the residue of said estate, if not under the will, then under the statute of descent and distribution of the State of Texas, and it was in said original bill alleged that the said defendants thereto, Hugh McClelland, Otis McClelland and Hugh L. Grismer, were falsely asseverating that the plaintiff was without interest in the estate of his father and that upon plaintiff's death said estate would belong to them and to such other parties, unknown to the plaintiff, as may be comprehended within the designation "my heirs at law", and plaintiff avers that such false asseveration cast a cloud upon his title to the estate of the said testator, and that such cloud should be, and he there prayed that the same should be, removed.

Plaintiff now avers that the material portions of the said will which then required construction were Items 4 and 8, and a certain portion of Item 2 of the codicil. Item 4 of the will is as follows:

"I give and bequeath to my beloved son, Peter McClelland, Junior, should he survive me, all the residue of my estate, real, personal, and mixed, to be received, however, and enjoyed by him only *in futuro,* upon the terms, conditions, incumbrances, trusts and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of my said son during the said

period of twenty-five years, should he live so long." Item 8 of the will is as follows:

"Upon my death, and after the probate of this will, as aforesaid, my said executors accepting and qualified to act, as aforesaid, are hereby authorized and empowered to take possession of my entire estate, whether in money, real estate, personal or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms, and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long; and after the expiration of twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same; but should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges, and incumbrances herein created, according to the laws of the State of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living."

The pertinent portion of Item 2 of the codicil reads:

"I further desire to continue the trusts created herein in my executors for and during the natural life of my son, Peter; but, if in their judgment he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him and in said will."

Paragraph 10 of plaintiff's said original bill is as follows:

"That the said defendant, Hugh McClelland, is a nephew of the said testator, and the said defendant, Mrs. M. E.

Grismer, is a niece of the said testator, and they and each of them, are comprehended within the terms of 'my heirs at law' as employed by the said testator in item 8 of the said will, and there may be others who are also comprehended within that designation, but they are unknown to complainant, and he is, therefore, unable to make them parties hereto."

Paragraph 11 of plaintiff's said original bill reads:

"The said defendants, Hugh McClelland and Mrs. M. E. Grismer, are each of them falsely asseverating that complainant is without interest in the estate of his father, the aforesaid testator, and that said estate upon complainant's death will belong to them and to such other persons, unknown to complainant, as may also be comprehended within the aforesaid designation 'my heirs at law', and complainant avers that such false asseveration casts a cloud upon his title to the said estate of the said testator, and that such cloud should be, and he here prays that the same may be, removed."

..... Plaintiff further averred in his said original bill that he is entitled to the full, quiet, immediate and undisturbed possession and enjoyment of the estate of the said testator, and he prayed for a decree to that effect, and, in the alternative, he prayed that if for any reason he was not then entitled to be let into the possession of said estate yet that he have a decree adjudging the alleged claims of the collateral heirs or executory devisees, and each of them, void and that it be decreed that the said executory devisees did not have any interest whatever in said estate or any part thereof.

4. Thereafter, on July 1, 1912, the defendants, John K. Rose, Trustee, Hugh McClelland, Hugh L. Grismer and Otis McClelland, interposed their joint and several demurrer to the plaintiff's said original bill. Said demurrer comprises nine grounds, the fourth ground being:

"That said bill shows that the complainant has no right, title or estate in the property of said Peter McClelland, his only interest therein being the right to the monthly allowance to be paid to him by the trustee, as provided by said will."

The seventh ground was:

"That the original bill and amended bill of the complainant, show on their face that there are other parties, viz., the unknown heirs of the testator, who are indispensible parties to this suit, as they are shown by said bill to stand in the same relation to the property involved as the defendants, Hugh McClelland, Otis McClelland and Hugh Grismer, and this court cannot proceed to a decree unless such persons are made parties to this bill."

The ninth ground of said demurrer was:

"That the complainant is concluded and estopped by the decree of the 19th District Court of McLennan County, Texas, appointing John K. Rose, Trustee, and declaring the nature of the trust created by the will of Peter McClelland from raising any of the questions he attempts to raise by his pleadings in this cause. The parties being the same and the subject-matter the same as in the instant case, and the conclusion shown to have been reached by said decree could not have been reached without deciding every question attempted to be now raised in this cause by the complainant adversely to his contention."

4. Thereafter, on November 19, 1912, this court overruled the seventh and eighth grounds of the said demurrer but sustained the first, second, third, fourth, fifth, sixth and ninth grounds of said demurrer, and thereupon this court dismissed plaintiff's said original bill, whereupon plaintiff excepted, gave notice of an appeal and perfected same to

the Honorable the Circuit Court of Appeals of the United States for the Fifth Circuit.

5. Thereafter, on October 13, 1913, the said United States Circuit Court of Appeals reversed the said decree and remanded the case to this court with instructions to overrule the demurrer, and for further proceedings, saying:

"We are of the opinion that, on the averments of the bill, the plaintiff is the owner of the estate devised and in controversy subject to the trusts created by the will; that the defendants—testator's collateral kin—have no interest, under the will, in the same; and that plaintiff, the averments of the bill being admitted or proved, should have a decree to that effect. (McClelland v. Rose, 208 Fed. 503, 512.)

6. After the remand of the cause the said defendants on January 26, 1914, filed herein their joint and several answer wherein and whereby, among other things, they admitted the truth of the allegations contained in plaintiff's said amended bill, and they also admitted the allegations contained in paragraphs Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10 and 12, and they also admitted the existence of the facts averred in paragraphs Nos. 13, 14, 15, 16, 17, 18 and 19 of plaintiff's said original bill, but they denied the construction and interpretation placed thereon by the plaintiff, and in lieu thereof contended that the effect of the said will was to vest the legal title to the whole estate in the executors for a term of twenty-five years, and that no title to any part of said estate ever vested in the plaintiff and that upon his death the same would go to the executory devisees; and they further therein pleaded *res adjudicata, stare decisis,* and denied that the plaintiff had any interest in the said estate other than his right to a mere monthly allowance, and alleged that upon plaintiff's death said estate would belong and go to the said defendants Hugh McClelland, Otis McClelland and Hugh

L. Grismer and "such other persons as may be comprehended in the designation by Peter McClelland, Senior, of "my heirs at law", and that the class so designated would, upon the death of plaintiff, "take a fee simple title to all the property, both real, personal and mixed, belonging to the estate of Peter McClelland, Senior."

Said defendants further alleged that the judgment rendered on March 17, 1906, by the District Court of the 19th Judicial District of the State of Texas, in which John K. Rose was appointed substitute trustee, was res adjudicata of and concluded plaintiff in his contentions, and it was further therein averred that the said will had been construed by the courts of Texas in Prather et al v. McClelland, reported in 26 Southwestern Reporter, page 625; in McClelland et al v. McClelland, reported in 37 Southwestern Reporter, page 350; and Wood et al v. McClelland et al., reported in 53 Southwestern Reporter, page 381, and that in each of such cases it was held that the plaintiff had no interest in said estate except as a beneficiary of a spendthrift trust, and that the decisions in those cases construing said will had become a rule of property in the State of Texas; and further, that such was the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Sanger v. Rovello, reported in 173 Federal Reporter, page 1022; and it was further therein alleged that the facts and circumstances surrounding the testator at the time of the execution of the said will and the said codicil were such as would conclusively show that the testator did not intend that the plaintiff herein should take his estate, and said defendants prayer that they be allowed to introduce parol evidence, etc.

7. Thereafter, on February 27, 1914, upon a hearing it was by this court found and decreed that the allegations in plaintiff's said original bill and in his said amended bill were true and it was decreed that the plaintiff, subject to the trusts

created by the said will and the said codicil, was the owner in fee of all and singular the estate of said Peter McClelland, Senior, deceased, consisting, among other things, of various tracts of land in said decree described, situated in the City of Waco, in the County of McLennan, and being in value in excess of $500,000, and it was therein solemnly decreed that the executory limitation over provided for by Item 8 of the will had become wholly extinguished, and that the executory devisees therein named (meaning testator's collateral kin) had then no interest in or claim to the said estate of said Peter McClelland, Senior, either in whole or in part, and it was further ordered that an accounting be had between John K. Rose, as trustee, and this plaintiff, and A. P. McCormick, Esquire, a citizen of Waco, was duly appointed commissioner and empowered to take testimony and to make and to state unto this court, in detail, a true, full and complete statement of account between the parties. It was further decreed that this plaintiff was not then entitled to be let into possession.

8. Thereafter, on April 23, 1914, plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit from so much of the said decree as adjudged that he was not then entitled to the possession and enjoyment of the said estate.

9. Thereafter, on July 14, 1914, the said defendants duly perfected their appeal from all of the aforesaid decree, and thereafter the appeal of this plaintiff and that of the said defendants were consolidated and submitted to the said United States Circuit Court of Appeals as a single cause.

10. Thereafter, on April 14, 1915, the said United States Circuit Court of Appeals affirmed the said decree in so far as the said defendants were concerned, but as the result of the plaintiff's said appeal, added the following pro-

vision to the said decree previously rendered by this Court, to wit:

"It is further ordered, adjudged and decreed that if the trustee shall hereafter, under the direction and control of this court or any other court seized of jurisdiction, find that the plaintiff is provident and careful within the terms and meaning of paragraph 2 of the codicil of August 17, 1886, and thus entitled to advances of and from the trust estate, such trustee may, under the direction and control of the court, make such advances." McClelland v. Rose et al., Rose et al v. McClelland, 222 Fed. 67, 68.

11. Thereafter the said defendants, as petitioners, filed in and on Monday, April 10, 1916, submitted to the Supreme Court of the United States, their petition for a certiorari to be directed to the said United States Circuit Court of appeals, and said petition was thereafter, on the 17th day of April, 1916, denied by the Supreme Court of the United States, and then and thereby the aforesaid decree so rendered by this court in favor of this plaintiff and against said defendants, and the class represented by said defendants, became final, valid and forever binding.

12. Plaintiff now avers that the said A. P. McCormick, Esq., Commissioner, has not as yet taken testimony, nor has he as yet made and stated unto this court, in detail or otherwise, a true, full and complete statement of account between the parties, and that this cause is still pending in this court in respect of such accounting.

13. Plaintiff now shows that thereafter, on May 31, 1916, the said defendant John K. Rose, as trustee, notwithstanding the matters and things had been fully and finally adjudicated by this court, and in violation of the aforesaid decree rendered and entered by this court, and in defiance of the jurisdiction and decree of this court, and contrary to

conscience and with the intent and purpose of nullifying the aforesaid decree of this court, filed in the District Court of the 54th Judicial District of the State of Texas, his petition in that certain cause numbered 6480 and entitled John K. Rose, Trustee, v. W. H. Hoffman et al., whereby the said Rose then sought, and now seeks, to restrain S. S. Fleming, the Sheriff of McLelland (McLennan) County, Texas, and certain residents and citizens of the said County of McLennan, State of Texas, to wit, W. H. Hoffman, Robert H. Rogers, D. A. Kelley and Anna G. Herring, independent executrix of the will of W. D. Herring, deceased, and certain residents of the County of Los Angeles, in the State of California, to wit, Laura Beall Bagby and her husband, W. H. Bagby, from making a threatened sale under an order of sale of certain specified portions of the real estate belonging to said estate. Said petition goes further and makes a great many additional parties defendant, among them the plaintiff herein, and it is therein, among other things, alleged that the said will of the said Peter McClelland, Senior, deceased, had been construed by the courts of Texas in the cases of McClelland v. McClelland, reported in 37 Southwestern Reporter, page 350; Wood v. McClelland, reported in 53 Southwestern Reporter, page 381; McClelland v. McClelland, reported in 101 Southwestern Reporter, page 1171; and in Lindsey v. Rose, reported in 175 Southwestern Reporter, page 829, and that in each of said cases it was held that this plaintiff had no interest in any of the property, that he took nothing under the will, and that said estate passed by the terms of said will, subject to the trust therein created, to the collateral heirs of the said testator designated by him in said will as "my heirs at law"; and it is therein further alleged that this court in this cause had decreed that this plaintiff "held and owned in his own right an absolute vested remainder interest in fee in all the property of said estate under the said will of Peter McClelland, deceased, subject only

to the trust created therein, and that said Hugh McClelland, Hugh L. Grismer and Otis McClelland (the latter two having been made parties as the sole heirs of Mrs. M. E. Grismer whose death had been suggested by plaintiff) acquired no right or title in and to any of the property of said estate under said will."

And the said defendant John K. Rose in said petition avers that its (it) is proper and necessary that the said State court now construe the said will, and he therein suggests to the said State court that certain defendants therein named comprise the class designated by the said testator as "my heirs at law" in so far as he is advised and believes. And said petition further makes F. M. Etheridge and J. M. McCormick, citizens of the City and County of Dallas, in the State of Texas, parties defendant under an allegation that they are claiming an interest in the said estate, such claim being made under and through this plaintiff. A duly certified copy of said petition so filed in said State court by the said defendant John K. Rose, as trustee, as the plaintiff therein, is hereto attached marked Exhibit "A" and made a part hereof, and from an inspection thereof it will manifestly appear that said suit in said State court constitutes an attempt on the part of the said defendant John K. Rose to call in question and nullify the said decree rendered by this court, and to defy the jurisdiction of this court and to relitigate in the said State court all and singular the issues and controversies that have been finally adjudicated by this court.

14. Plaintiff now shows that thereafter, on June 12, 1916, in the said suit in the said State court certain of the parties made defendants therein, to wit, S. L. Huston, William Cline, A. H. Cline, Fred C. Cline, May Cline Babcock, Alice Brinkerhoff, joined by her husband, Henry Brinkerhoff, Etta May Perisho, George D. Murphy, Nellie Shearer, Chas. A. Cline, G. B. Cline, John M. Cline, Ollie Bennett, Elizabeth Zim-

merly, Josephine Alexander and her husband, J. W. Alexander, Katie Goodman and Freddie Goodman filed therein their answer and cross-bill alleging, among other things, that they are members of the class of the collateral kin of the testator designated by him in said will as "my heirs at law", and they therein aver that this plaintiff has no interest in the said estate of the said testator, and they make this plaintiff and the said F. M. Etheridge and the said J. M. McCormick parties defendant in said purported cross-bill, alleging that the said F. M. Etheridge and the said J. M. McCormick are claiming some interest under this plaintiff, and they pray for an adjudication to the effect that this plaintiff and the said F. M. Etheridge and the said J. M. McCormick have no interest in or title to the said estate, or any part thereof, and it is therein alleged that the United States Circuit Court of Appeals for the Fifth Circuit construed the said will contrary to the construction thereof by the courts of Texas, and they therein allege certain facts and with reference thereto aver that parol evidence of the alleged existence thereof would operate to bring about an adjudication to the effect that this plaintiff is without interest in the said estate, and that the class designated by the said testator as "my heirs at law" own the same subject to the trust. A duly certified copy of said purported cross-bill is hereto attached marked Exhibit "B" and made a part hereof.

15. Plaintiff now shows that thereafter, on October 19, 1916, the said John K. Rose, trustee, as plaintiff in said suit in the said State court, filed therein his purported supplemental petition, a true and correct copy whereof is hereto attached marked Exhibit "C" and made a part hereof, whereby the defendants who are alleged to comprise the said class designated by the said testator as "my heirs at law" are revised and corrected, and whereby, among other things, certain unknown heirs of certain named deceased persons are made parties, and whereby an order of publication for

service upon such of the defendants as are nonresidents of the State of Texas is prayed for, etc.

16. Plaintiff now shows that thereafter, on to wit, October 31, 1916, the said defendants originally named in the said purported cross-bill of S. L. Huston and others, a number of the other defendants herein joining them, filed in said suit in the said State court their purported first amended original appearance and cross-bill in lieu of the original appearance and cross-bill filed therein on June 12, 1916, and whereby the contentions sought to be made in said original purported cross-bill are reiterated. A true and correct copy of said purported "first amended original appearance and cross-bill" is hereto attached marked Exhibit "D" and made a part hereof.

17. Plaintiff avers that he and the said F. M. Etheridge and the said J. M. McCormick were cited to appear and answer the said suit in said State court on September 25, 1916, and that in obedience to such command they appeared and filed therein on September 20, 1916, an answer, a true copy whereof is hereto attached marked Exhibit "E" and made a part hereof.

18. Plaintiff shows that on September 28, 1916, the following named defendants in the said suit in the said State court, to wit, W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, executrix of the last will and testament of W. D. Herring, deceased, and S. S. Fleming, Sheriff of McLennan County, Texas, filed therein their answer, a true copy whereof is hereto attached marked "Exhibit F" and made a part hereof.

19. Plaintiff now shows that in the said suit in the said State court the said John K. Rose, as trustee, as plaintiff therein, obtained an order for service by publication upon all of the defendants in said suit who have not answered

and who are nonresidents of the State of Texas, and that publication of such service has been, or is being, made whereby the said defendants who are cited by publication are required to answer in the said suit in said State court on Monday, the 12th day of March, 1917. A true copy of said purported publication is hereto attached marked Exhibit "G" and made a part hereof.

20. Plaintiff now alleges that of the defendants in the said suit in the said State court those hereinafter named in this paragraph are represented herein by their attorneys J.F. Brinkerhoff, Esq., and Messrs. Stribling & Stribling as their attorneys of record, and that said attorneys reside in the City of Waco, McLennan County, Texas. The said defendants so represented by them are these: S. L. Huston, William Cline, Alvah H. Cline, Alice Brinkerhoff, Henry Brinkerhoff, Etta May Perisho, W. H. Perisho, Jr., George D. Murphy, Charles Cline, John M. Cline, Ollie Bennett, W. I. Bennett, Elizabeth Zimmerly, Sam E. Zimmerly, Rachel A. Kime, John O. Kime, William Brinkerhoff, Ethel Quillen, W. M. Quillen, Harland S. Huston, Susie Clapp, C. C. Clapp, Lula Huston, Nettie W. Murphy, C. E. Clinton, Frank Clinton, Eva Hollingsworth, Felix Hollingsworth, Samuel P. Gray, Jessie Wilie, William L. Gray, N. Hariet Pearl, Nettie Benbow, W. C. Benbow, Grover C. Konkler, W. C. Konkler, Josephine Alexander, J. W. Alexander, Kate Goodman, Fred Goodman, Charles Goodman, and Oscar F. Goodman.

21. Plaintiff now shows that on the trial of this cause in this court on February 27, 1914, the said defendants having in their answer pleaded the alleged existence of certain facts and praying that oral testimony be received in support thereof did offer certain oral and other testimony, all of which was by this court excluded, to which ruling the defendants herein excepted and embodied such excluded testi-

mony in bills of exception and did assign such ruling as error on their said appeal to said United States Circuit Court of Appeals; the proffered testimony so excluded being, among other things, the following: a duly certified transcript of the record of cause No. 4007, entitled Peter McClelland v. Hugh McClelland, tried in the District Court of McLennan County, and the report of the case under the style of McClelland v. McClelland, reported in 101 Southwestern Reporter, page 1171; also duly certified transcripts on appeal in the following cases, to wit: Peter McClelland v. Dora McClelland; George H. Wood et al. v. Peter McClelland et al.; Sanger v. Rovello, which was tried in this court and is reported in 173 Federal Reporter, page 1022; and in the case of W. L. Prather et al. v. Peter McClelland et al., and certain proffered oral testimony of J. F. Brinkerhoff, W. M. Orand and Hugh McClelland, the proffered testimony thereof being tendered for the purpose of proving the situation and circumstances surrounding the testator, Peter McClelland, Senior, at the time of the making of the will and the codicil; and further to show the relations that existed at the time of the making of the will and also at the time of making the codicil between the testator and the plaintiff Peter McClelland, and also between the testator and his other relations interested in this will. Also they offer to show by the witnesses named the character of Peter McClelland, Senior, and the character of Peter McClelland, Junior, particularly in relation to property and business. They offer to show that Peter McClelland, Jr., was a man of weak character and intellect, of no business capacity whatever, and with no capacity to take hold and retain property; that the said Peter McClelland, Jr., was easily influenced by designing men and could be readily wheedled out of his property, and that these facts were known to his father at the time of the making of the will and at the time of the making of the codicil. That at the time of the making of the will

Peter McClelland, Jr., had been married but his first wife was dead. That at the time of the making the codicil he was married to his second wife, who was Miss Sabin. That Peter McClelland, Sr., had a violent and persistent dislike for the Sabins and particularly for Judge Sabin, father of Peter McClelland, Jr.'s, wife. That Peter McClelland, Sr., had taken a prejudice against Judge Sabin, who was United States District Judge for the East District of Texas, and was strongly of the opinion that Peter McClelland Jr., had been inveigled into the marriage with Miss Sabin, for the purpose of her becoming possessed of Peter McClelland Sr.'s estate. That at the time of the making of the will, Peter McClelland, Jr., and his father were on good terms; but that at the time of the making of the codicil, there was a bitterness existing between Peter, Junior, and his father. That Peter, Junior, was regarded by his father as having no feeling for him; that Peter, Junior, left the State of Texas to visit at Atlanta while his father was on his dying bed; and only went to see his father at the solicitation of others shortly before his death upon his return. Defendants propose further to show that affectionate relations existed between Peter McClelland, Sr., and his collateral kin interested herein, especially as to Mrs. Grismer, his niece, Hugh McClelland, his nephew, and Mrs. Huston, his sister who lived in Illinois. That shortly before his death he visited his sister, Mrs. Huston, in Illinois and spent a number of weeks with her; and that he often visited his other collateral kin; and that he had given 200 acres of land to Mrs. Grismer, and her home, and assisted Hugh McClelland with various gifts of property, showing an affectionate regard for all of his collateral kin interested in this will. That he gave Mrs. Grismer and Hugh McClelland 220 acres of land each. Defendants expect further to show that Peter McClelland, Jr., was weak intellectually and incapable of taking an education; that he had been sent home from school for the express rea-

son that it was impossible to teach him anything. That at the time of the making of the codicil, Peter McClelland, Sr., and his wife, Joanna McClelland, had given Peter McClelland, Jr., property in the City of Waco of the value of at least $40,000, being the property he owned at the time of the making of the codicil and which property he squandered directly after his father died; in addition to $25,000 cash which he had procured from his step mother in the following manner: He pursuaded his step mother, Joanna McClelland to sign a note for him for $5,000 to a bank, and upon the claim that the note had to be renewed from time to time, he, in this manner, procured her signature to notes totaling the sum of $25,000, she being of the opinion all the time that she was only bound to the bank for $5,000, whereas, in fact she discovered she was bound for $25,000. Defendants expect to show that Peter McClelland, Sr.'s controlling passion in life was the love of property and its accumulation, and that his son Peter was always secondary in his thoughts to his property, and that he was tormented at the time he made his codicil with the thought that Peter would in some manner get possession of his property and waste and squander it. Further that Peter McClelland, Jr., was 31 years old at the time he made the codicil, and that he is now 58 years old, being born in 1856.

To the admission of all of which proffered testimony, at the time it was offered, the plaintiff duly and in open court objected upon the following grounds: First, that there exists no ambiguity in the will; second, that there exists no ambiguity in the codicil; third, that there exists no ambiguity in the will and the codicil, both taken together; fourth, because the will and codicil have heretofore been construed by the United States Circuit Court of Appeals for the Fifth Circuit in this case, and because the pleadings raise no such issue. Which objections were sustained by the Court; and

thereupon the defendants duly and in open court excepted, and now here tender this their bill of exception No. 1, and ask that the same be examined, allowed and approved and made a part of the record herein, which is hereby accordingly done. T. S. MAXEY, *Judge*.

22. Plaintiff now shows that the said defendants in this cause on their aforesaid appeal from the said decree rendered by this court in this cause, assigned as error the ruling of this court in excluding the documentary and oral testimony proffered by them as aforesaid, with the result that the said United States Circuit Court of Appeals, in affirming the aforesaid decree on April 14, 1915, said:

> "The present appeal presents for review no ruling which would warrant a reversal of the decree at their instance."

Plaintiff now avers that the alleged error in the matter of the exclusion of the aforesaid proffered testimony, which testimony this court and the said United States Circuit Court of Appeals held inadmissible, was complained of by the said defendants to the Supreme Court of the United States in their said petition for certiorari, and the question was, in the said Surpreme Court of the United States, fully presented and ably discussed by able counsel for the said defendants, among them Judge J. J. Darlington of the City of Washington, District of Columbia, and by the attorney who is now attorney for the said John K. Rose, as trustee, as plaintiff in the said suit in the said State court.

23. Plaintiff now avers that the documentary and oral testimony so proffered by the said defendants in the trial of this cause in this court, which proffered testimony was excluded and the ruling in excluding which the said United States Circuit Court of Appeals distinctly held presented no error, was identically the same as that which is alleged in

the said pleadings filed in the said suit in the said State court, and the alleged extraneous facts and circumstances sought by the pleadings to be injected in the said suit in the said State court are identically the same as those which the said defendants sought to inject into this cause on the trial thereof by this court, and the admissibility and effect of all and singular the alleged extraneous facts and circumstances, as alleged in the said pleadings in the said suit in the said State court, have been by this court passed upon and definitely decided, and the defendants herein are now concluded by the adjudication of this court in that respect and are, therefore, precluded from again attempting to litigate such issues with this plaintiff.

24. Plaintiff now avers that so much of the said suit in the said State court as is solely directed against the defendants S. S. Fleming, Sheriff of McLennan County, Texas, W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring as independent executrix of the last will and testament of W. D. Herring, deceased, Laura Beall Bagby and her husband, W. H. Bagby, and to the extent that it seeks to enjoin the last named defendants therein from proceeding to an illegal sale threatened by them under a certain order of sale, is permissible, and that it is not the object and purpose of this supplemental bill to enjoin the said John K. Rose, as trustee, as plaintiff in said suit in the said State court, from maintaining or prosecuting the same against the said specified defendants and for the only purpose of the injunctive relief prayed for as against the threatened sale.

25. Plaintiff now avers that in all other respects the said suit in the said State court has been instituted and is now pending in direct and palpable contempt of the jurisdiction and decree of this court, and that it constitutes an unwarranted attempt on the part both of the said defendant John K. Rose, as plaintiff therein, and of all of the defendants therein,

other than those named in the last preceding paragraph hereof, to defy the aforesaid final, valid and subsisting decree of this court, and to involve this plaintiff and those who claim under him in a relitigation of all and singular the identical issues and controversies that were involved in this cause in this court, and which, by this court, have been finally adjudicated.

26. Plaintiff now avers that this court has jurisdiction to construe, enforce and render effective its aforesaid decree herein heretofore rendered in this cause, and that he has the undoubted legal and equitable right to have such decree construed, enforced and made effective to the end that the benefits of said decree and the protection afforded thereby in his favor be preserved unto him.

27. Plaintiff now avers that his aforesaid original bill, as amended as aforesaid, constituted what is commonly known to the equity practice as a "class bill." He avers that the trustee and three prominent members of the class designated by the said testator as "my heirs at law" were made parties and that the parties so made were sufficient both in number and in extent of interest to insure in this court a full, fair and just trial of all the issues involved, and he avers that every member of the said class designated by the said testator as "my heirs at law", whether specifically named as parties to the record or not, were nevertheless parties to this cause by representation by the said John K. Rose, as trustee, and by the said Hugh McClelland, Otis McClelland and Hugh L. Grismer, as members of the said class; and plaintiff therefore, avers that each and every member of said class became, were and are bound and forever concluded by the aforesaid final, valid and subsisting decree rendered by this court in this cause, as aforesaid.

28. Plaintiff now prays that the aforesaid final decree

rendered by this court in this cause be construed, extended and enforced so as to embrace and include each and every member of the said class whose name and residence is given hereinabove, and plaintiff avers that he does not know of the existence or whereabouts of any other member of said class, and he, therefore, prays that said decree be extended to and that it embrace, in addition to the members of said class specifically named, all and singular the said unknown heirs at law of the said Peter McClelland, Senior, deceased, to the end that plaintiff may have that full, complete and effective remedy to which in equity he is, in consideration of the premises, justly entitled.

29. Premises considered, plaintiff prays that this Honorable Court forthwith grant and hereafter perpetuate a writ of injunction enjoining and forever restraining each and every of the defendants herein, known and unknown, from the further prosecution of the said suit in the said State court numbered 6480 and entitled John K. Rose, Trustee, vs. W. H. Hoffman et al., on the civil docket of the District Court of the 54th Judicial District of the State of Texas, except to the extent and for the sole purpose set forth in paragraph 24 hereof, and that they, and each of them, their attorneys, agents, servants and employees be perpetually enjoined from the institution or prosecution of any other suit in any other court, which may have for its object and purpose the impeachment or nullification of the aforesaid final decree of this court. Plaintiff avers that an imperative necessity exists for the immediate issuance of the writ of injunction herein prayed for, and he, therefore, prays that the same forthwith issue.

30. Plaintiff specially prays that the said defendant John K. Rose, as trustee, be enjoined from the further prosecution of his aforesaid action in the said State court, except to the extent specified in paragraph 24 hereof, and further,

that he be enjoined from instituting any other suit in any other court for the purpose of challenging either the validity or the effect of the aforesaid final decree entered in this cause by this court.

31. Plaintiff further specially prays that the defendants Hugh McClelland, Otis McClelland and Hugh L. Grismer, and each of them, be perpetually enjoined from any participation whatsoever in the prosecution of the said suit in the said State court in the capacity either of co-plaintiffs, co-defendants or intervenors therein, and that they, and each of them, be perpetually enjoined from the institution or prosecution of any other suit in any other court which may have for its purpose the challenging of either the validity or the effect of the aforesaid final decree rendered by this court in this cause.

32. Plaintiff prays this Honorable Court to issue a writ of subpoena in due form of law according to the rules of this court to be directed to the said defendants John K. Rose, Trustee, Otis McClelland, Hugh McClelland, Hugh L. Grismer, Josephine Alexander and her husband, J. W. Alexander, Stellar Arey and her husband, George Arey, Nora Armstrong and her husband, Thomas Armstrong, Mrs. May C. Babcock, Ollie Bennett and her husband, W. I. Bennett, Katherine Bennett and her husband, Samuel Bennett, William Brinkerhoff, Alice M. Brinkerhoff and her husband, H. H. Brinkerhoff, Nettie Benbow and her husband, W. C. Benbow, Mamie Brown, Jennie Brown, Cora Brown, Rebecca Braymer and her husband, Edward Braymer, Cora Bowers and her husband, James C. Bowers, John A. Bryant, Frank B. Bryant, J. L. Bryant, surviving wife of Alfred Bryant, Perry Brown, Susie Clapp and her husband, C. C. Clapp, Charles W. Cline, Sam B. Cline, Charles Cline, George V. Cline, John M. Cline, William Cline, Alvah H. Cline, Montervill Clinton, Inez Clinton, Ethel Clinton, Otis

Clinton, William Clinton, George Clinton, C. E. Clinton, Frank Clinton, Josie Goodman Collins, Leona Dodge and her husband, Robert W. Dodge, Mollie Davis and her husband, Fred H. Davis, Elgie L. Fisher, Charles Goodman, Mollie Goodman, Bert Goodman, Nell Goodman, Henrietta McFall Goodson and her husband, Itys Goodson, Fred Goodman, Kate Goodman, Charles Goodman, R. E. Goodman, William L. Gray, Thomas Gray, Samuel P. Gray, Elizabeth Bryant Hall, Ibbie Helton, Eva Hollingsworth and her husband, Felix Hollingsworth, Harriet Hooker, Lula Huston surviving wife of Charles H. Huston, Samuel L. Huston, Harland S. Huston, Mrs. E. H. Johnson, Gallia A. Jones, Rachel A. Kime and her husband, John O. Kime, Grover C. Konkler, W. C. Konkler, Luna Helton Layson and her husband, Bert Layson, C. A. Lowry, Mossie Lowry, Clyde B. Lowry, Joe D. McClelland, Samuel McClelland, W. F. McFall, Walker McFall, Mrs. E. F. Montgomery and her husband, David M. Montgomery, Versa Murphy, Delbert Murphy, Netta W. Murphy, George D. Murphy, Don Murray, Edna Moehlman and her husband, Paul Moehlman, R. L. Murray, Guy Murray, Mrs. A. G. Murray and her husband, A. G. Murray, Rebecca Orr and her husband, Harry Orr, Grace O'Bryant and her husband, ...O'Bryant, Ellen Parmento and her husband, ...Parmento, N. Harriett Pearl, Etta M. Perisho and her husband, W. H. Perisho, Jr., Ethel Quillen and her husband, W. M. Quillen, Minnie Raymond and her husband,.....Raymond, Mina Tymal, Mary Stone, Nellie Sherrer and her husband,.....Sherrer, Harriett Swackhammer, Maude Vermillion and her husband, Arthur Vermillion, Jessie Gray Wiley and her husband, Charles Wiley, Eugenia Witt, Elizabeth Zimmerly and her husband, Sam E. Zimmerly, Mrs. Andrew Zink and Francis Zink; and plaintiff further prays this Honorable Court to issue a writ of subpoena in due form of law according to

the rules of this court to be directed to the unknown heirs of Peter McClelland, Senior, deceased, and of Margaret Jane (McClelland) Gray, of Sarah (Gray) McFall, of Margaret Jane (Gray) Murray, of Ann (McClelland) Gray, of Thomas Gray, Jr., of Peter Frank McClelland, of Harriett McClelland Jones, of Elizabeth McClelland Rymal, of Sallie Clinton, of William Clinton, of Hugh Clinton, of Jacob Clinton, of Charles Huston, of Andrew Cline, of Charles Murphy, of James A. Goodman, of William Goodman, of Richard Goodman, of John Goodman, of Margaret Brown, of Mary Goodman Bryant, of Frank Bryant, of John A. Bryant, of Alfred Bryant and of Emma Bryant Lowry, and their heirs and legal representatives, and that each and every of said subpoenas command the said defendants and each of them under a certain penalty therein to be limited personally to appear before this Honorable Court and then and there full, true, direct and perfect answers make to all and singular the premises, and further to stand and perform and abide such further order, direction and decree therein as to this Honorable Court shall seem agreeable to equity and good conscience, but not under oath, the same being expressly waived, the several allegations in this, plaintiff's supplemental bill contained, and plaintiff avers that it is not practicable to make service of such of the writs of subpoena as shall be directed to such of the defendants as are herein alleged to be nonresidents of the State of Texas, and that it is proper and necessary that the service of such subpoenas upon such defendants be made by publication, and plaintiff further avers that it is not possible to obtain service of such subpoenas as shall be directed to the unknown heirs hereinbefore specified, and their heirs and legal representatives, who are hereby made parties defendant to this supplemental bill, otherwise than by publication, and plaintiff, therefore, specially prays that service of all such subpoenas be made by publication in accordance with such

order therefor as may be prescribed by this Honorable Court, and plaintiff prays that this Honorable Court make an order for such service by publication, prescribing the method by which same shall be perfected, and he espicially prays that upon a hearing hereof each and every of the said defendants, as well as each and every of the aforesaid unknown heirs, be adjudged and decreed to have been parties, either actual or by representation, to this cause in this court, and that each and every of them whether known or unknown be decreed to be forever concluded by the aforesaid final decree rendered by this court in this cause, and that said decree be so extended as to embrace by name each and every of said dfendants, including those known as well as those unknown, and that the cloud cast upon plaintiff's title by their alleged claim be forever removed, and for all such other special and general relief as in the premises plaintiff may be entitled to, and as, etc.

ETHERIDGE, MCCORMICK & BROMBERG,
Solicitors for Peter McClelland, Junior, Plaintiff.

FRANCIS MARION ETHERIDGE,
Of Counsel.

THE STATE OF TEXAS
County of Dallas

BEFORE ME, the undersigned authority, on this day personally appeared Francis Marion Etheridge, who being by me first duly sworn deposes and upon oath says that he is of counsel for Peter McClelland, Junior, plaintiff in the above entitled and numbered action and that as such he subscribes this affidavit; that this affidavit is not subscribed by the said Peter McClelland, Junior, because he is without the district and because he has not the personal familiarity with the facts recited in the above and foregoing supplemental bill that is possessed by the said Francis Marion Eth-

eridge; and the said Francis Marion Etheridge further deposes that he has personal knowledge of the origin and history of the litigation and of the facts recited in the above and foregoing supplemental bill, that such knowledge thereof was acquired by affiant by reason of the fact that he has been of counsel for the plaintiff continuously since before the date of the filing in this court of the plaintiff's said original bill, and affiant avers that the facts alleged in the above and foregoing supplemental bill are true as therein stated. FRANCIS MARION ETHEREDGE.

Sworn to and subscribed before me by the said Francis Marion Etheridge on this the 11th day of November, A. D. 1916.

(Seal) CHAS. T. McCORMICK,
Notary Public in and for Dallas County, Texas.

"EXHIBIT A"

JOHN K. ROSE, *Trustee*

vs.

W. H. HOFFMAN Et Al.

In the 54th Judicial District Court, McLennan County, Texas,—July Term, 1916.

To the Honorable Judge of Said Court:

Your petitioner, John K. Rose, Trustee heretofore appointed by the 19th District Court to carry out and execute the trusts created by the last will and testament of Peter McClelland, Deceased, of he County of McLennan, State of Texas, hereinafter styled plaintiff and complaining of W. H. Hoffman, Robert H. Rogers, D. A. Kelly, Anna G. Herring, independent executrix of the estate of W. D. Herring, Deceased, and S. S. Fleming, Sheriff of McLennan County, Texas, resident citizens of the County of McLennan, State of Texas, and Laura Beall Bagby and her husband W. H. Bagby who reside in the County of Los Angeles, State of California, hereinafter styled defendants, would respectfully represent:

1. That heretofore to-wit: on the 22nd day of October, 1881, and the 17th day of August, 1886, respectively, Peter McClelland executed his will and codicil thereto, a copy of which is hereto attached and marked "Exhibit A."

2. And that thereafter the said Peter McClelland died in McLennan County, Texas, leaving an estate consisting of lands and personal property in said county of the probable value of $500,000 and said will and codicil were duly probated in the 19th District Court by a decree entered

therein on the 19th day of October, 1895, in causes Nos. 4497 and 4505 consolidated, and Wm. L. Prather was appointed sole independent executor as directed in said will.

3. And that Wm. L. Prather duly qualified in the County Court of McLennan County, Texas, on October 10th, 1895, as sole and independent executor of the aforesaid last will and testament of the said Peter McClelland & took possession of the property of said estate and administered same under said will until his death.

4. That said Joanna McClelland, surviving wife of Peter McClelland, elected not to take under said will, and on to-wit: October 10th, 1895, the estate was partitioned, and the community interest of the said surviving wife was duly set apart to her, and thereupon all the provisions made for her by said will ceased, and have ever since been inoperative.

5. That, to-wit: on July 24th, 1905, the said W. L. Prather died, and that thereafter to-wit: on March 17, 1906, plaintiff was duly appointed as trustee to act in the place and stead of the said W. L. Prather, deceased, by decree entered in said 19th District Court in case No. 14276 and 14280 consolidated, McClelland et al vs Peter McClelland, Jr., and that plaintiff immediately thereafter executed the required bond and duly qualified as such substitute trustee, and entered upon the discharge of his duties as such, and has so continued to this day, having in possession all the property, real and personal of said estate, and that he is now in possession thereof, and in the actual discharge of his duties as such trustee.

6. That on to-wit: the 9th day of May, 1916, defendants W. H. Hoffman, Robert H. Rogers, D. A. Kelly, Anna G. Herring, Executrix, Laura Beall Bagby and W.H. Bagby caused an order of sale to be issued out of the 54th District

Court of McLennan County, Texas, in a certain cause herein No. 6258 and styled W. H. Hoffman et al vs Peter McClelland Jr., and placed the same in the hands of defendant S. S. Fleming, Sheriff, for execution, and that said sheriff did, on the said 9th day of May, 1916, levy the same upon lots 1, 2, 3, and 4, in Block No. 6, in the City of Waco, McLennan County, Texas, according to the map and plan of said city, which belongs to said estate, said property being located on the south corner of the intersection of 4th and Austin Streets in the City of Waco as the property of Peter McClelland, Jr., and has advertised the same for sale on the first Tuesday in June, 1916, same being the 6th day of said month, at the court house door of McLennan County in the City of Waco, Texas, between the hours of 10:00 A. M., and 4:00 P. M. to be sold at Public vendue for cash to the highest bidder as the property of the said Peter McClelland Jr.

7. That said property constitutes a part of the said trust estate, and is now, and has been in the possession and under the control and management of plaintiff since his appointment as as such trustee, and that said judgment upon which said order of sale was issued purports upon its face to foreclose an attachment lien in favor of the plaintiffs in said case, who are defendants herein, against the said Peter McClelland, Jr.

8. Plaintiff further represents to the court that the Court of Civil Appeals for the Third Supreme Judicial District for the State of Texas, has construed the said will of the said Peter McClelland in cases appealed from this and the 19th District Court of McLennan County, Texas, first in the case of McClelland vs McClelland, reported in the 37th S. W. Rp. Page 350, and also in Wood vs McClelland, 53 S. W. Rp. 381; and also in the case of McClelland vs McClelland, 101 S. W. Rp. 1171; and also in the case of Lind-

sey vs Rose, 175 S. W. Rp. 829, and it was held in each of the said cases to the effect that said Peter McClelland, Jr., held no interest in any of the property that belonged to said estate under the said will of Peter McClelland, Deceased, and that the same could not be taken under execution or other process of law, and held subject to payment of his debts, and that the same passed by the terms of said will, subject to the trust therein, created to the collateral heirs of Peter McClelland, Deceased, designated in said will as my heirs at law.

9. Plaintiff further represents that after the aforesaid cases of McClelland vs McClelland reported in 37 S. W. page 350, and Wood vs McClelland reported in 53 S. W. page 381, and McClelland vs McClelland, 101 S. W. page 1171, the United States Circuit Court of Appeals for the Fifth Circuit, construed said will of said Peter McClelland, dec'd in a case instituted, in the United States District Court for the Western District of Texas, at Waco, by Peter McClelland, Jr., against this plaintiff, John K. Rose and Hugh McClelland and M. E. Grismer, two of the said collateral heirs, wherein he alleged that said McClelland and Grismer were falsely asseverating that he, Peter McClelland, Jr., was without interest in the estate of said Peter McClelland, Dec'd, and that upon his, complainant's death that the same belonged to them and such other persons unknown to complainant as may also be comprehended within the aforesaid designation in said will as "my heirs at law", and that such claim created a cloud upon his title to said property, and alleged that he was the true and sole owner thereof, and prayed that this cloud be removed from his title, filed in the District Court of the United States for the Western District of Texas at Waco, on the 17th day of April, 1912, styled No. 8, in Equity, Peter McClelland, Jr., Plaintiff, vs John K. Rose et al, Defendants; and in said case said court

held and decided in its opinion delivered therein which is reported in 208 Fed. Rp. page 503, to the effect that the said Peter McClelland, Jr., held and owned in his own right an absolute vested remainder interest in fee in all the property of said estate under the said will of Peter McClelland, deceased, subject only to the trust created therein, and that said Hugh McClelland, Hugh L. Grismer and Otis McClelland (the latter two having been made parties as the sole heirs of Mrs. M. E. Grismer whose death had been suggested by plaintiff) acquired no right or title in and to any of the property of said estate under said will.

10. Plaintif further alleges that none of the parties contemplated and designated in said will of Peter McClelland, dec'd, as "my heirs at law" were made parties to said last named suit save and except the said Hugh McClelland, and said two parties, Otis McClelland and Hugh L. Grismer, sole heirs at law of the said Mrs. M. E. Grismer, and this plaintiff is in grave doubt as to the true and proper construction of said will in the respects above stated, and decided by said various courts, and as to his duties as trustee under said will and the appointment of this court, and therefore admits (submits) to this court as to whether or not all parties claiming as legatees under said will should be made parties hereto and he (be) required to litigate among themselves, and the said plaintiffs in said judgment & order of sale, and have determined by a final adjudication binding upon all said parties, the construction of said will, and in whom the remainder of said estate is vested, and if said lots so advertised for sale is subject to sale under said order and to whom this trustee shall turn over said property at the expiration of said trust as provided by the terms of said will.

11. Wherefore, he suggests to the court that the names and residences of the heirs of said Peter McClelland, Deceased, as contemplated and designated in said will of Peter

McClelland, Deceased, as "my heirs at law", so far as this trustee is advised and believes are as follows:

Sarah H. McFall and Margaret Murry, Caldwell County, Mo., Thomas Gray and William Gray, Harrison County, Mo., Eugenia Witte, Harrison County, Mo., Ibbie Helton, Oval,.....County, Mo., Joe D. McClelland, Samuel McClelland, Harriet Hooker, Ellen Parmento and Mina Rymal, Caldwell County, Mo.; Gallie A. Jones, Yellow Stone County, Montana; Otis McClelland and Hugh L. Grismer, McLennan County, Texas; Hugh McClelland, Hale County, Texas; Nutter W. Murphy, Edgar County, Ill.; Harriett Pearl, Gage County, Neb.; William Clinton; Gass County, Mo.; George Clinton, Clark County, Ill.; Mrs. Andrew Zink, St. Clair County, Mo.; Hugh Clinton, Harriett Packhammer and Jake Clinton, ...County, Mo.; C. E. Clinton, Frank Clinton, and Eva Hollingsworth, Edgar County, Ill.; Samuel L. Huston, Edgar County, Ill.; Wm. Brinkerhoff, Edgar County, Ill.; Nettie Benbow, wife of Wm. Benbow, Multonah County, Ore.; Willie and Grover Conklin, Edgar County, Ill.; Charles Cline, S. V. Cline, Jno. M. Cline, Mrs. Ollie Bennett Elizabeth Zummerly, Katherine Bennett and Rachel Kime all of Edgar County, Ill.; S. B. Cline, Mrs. E. F. Montgomery, Caldwell County, Mo.; C. W. Cline, Fergus County, Montana; Mrs. Alice M. Brinkerhoff, Mrs. Etta M. Perisho, Mrs. Nellie Sherer and Geo. D. Murphy, Edgar County, Ill.; Versa and Delbert Murphy, Polk County, Ark.; Wm., A. H. and Fred C. Cline, Edgar County, Ill.; Mrs. May C. Babcock, Edgar County, Ill.; Jas. Madison Cline, Edgar County, Ill.; Mollie, John and Richard Goodman, Caldwell County, Mo.; Samuel E. Goodman, Los Angeles County, Cal.; Josephine Collins, Jackson County, Mo.; Bert Goodman, Jackson County, Mo.; Mamie, Jennie and Cora Brown, Caldwell County, Mo.; Mrs. Bessie Bryming, Clay County, Mo.;

Peter Brown, Coles County, Ill.; Wm. Goodman, Tulsa County, Okla.; Fred Goodman, Kate Goodman and Mrs. Josie Alexander, Coles County, Ill.; Peter Goodman, Coles County, Ill.; Mrs. Mary Bryant, whose residence at present is unknown, but can be ascertained, so plaintiff is informed.

In addition to the above, Peter Huston and Franklin M. Huston, children of Mary Huston, one of the sisters of Peter McClelland, Deceased, died during recent years in Edgar County, Ill., where the descendants now live, but whose names are not known at this time by plaintiff, but can and will be obtained so plaintiff is informed, and be made parties hereto should the court deem them proper or necessary parties, and that Margaret Brown, the daughter of Jennie Goodman, another one of the sister of Peter McClelland, DeDceased, is dead, and that her descendants so plaintiff is informed, live in Caldwell County, Mo., near Hamilton, their names at this time being unknown, but can and will be ascertained and made parties hereto, should the court deem them proper and necessary parties; and that Mary Bryant one of the daughters of the said Jennie Goodman is living, so plaintiff is informed, but whose residence is unknown at the present time, but can and will be ascertained if a proper or necessary party hereto; that Alfred Goodman, a son of the said Jennie Goodman, lived for many years and died in the state of California in which state plaintiff is advised, his descendants now live but their names and place of residence is unknown to plaintiff at this time, but may be ascertained, but whether ascertained or not can be made parties hereto, and brought before the court so that their interest in said estate as heirs at law of the said Peter McClelland, Deceased can be adjudicated, and they bound thereby; and plaintiff is informed and believes said parties are the sole collateral heirs of said Peter McClelland, Dec'd, and said heirs are asserting and claiming that they are entitled under said will to all the property of every kind and

character belonging to the estate of said Peter McClelland, Deceased, as legatees under his said will, subject to the trusts created therein and now being administered by this trustee under the terms thereof; and that said Peter McClelland, Jr., has not and never had any title or interest in any of said property, including the said lots levied upon and advertised for sale as aforesaid, and that said lots are not subject to sale by said Peter McClelland, Jr., or for his debts.

12. And he further represents that Peter McClelland, Jr., who is a resident citizen of the County and City of Los Angeles, State of California, and F. M. Etheridge and J. M. McCormick, resident citizens of the County of Dallas, State of Texas, to whom the said Peter McClelland, Jr., has heretofore conveyed a one-third undivided interest in and to all of the property, money and other effects in plaintiff's hands as trustee of the estate of Peter McClelland, Deceased, as contemplated by the terms of said will, are asserting and claiming that they have and hold title to all of said property by vested remainder in fee, and that said parties above named, and all others who come within the terms of said will as the "heirs at law" of said Peter McClelland, Deceased, have no claim to said property.

13. Plaintiff further represents that in view of said decisions of the courts of the State of Texas, the said property of said estate, to-wit: Lots 1, 2, 3 and 4, in Block 6, in the City of Waco so levied upon by said Sheriff of McLennan County, and advertised as aforesaid for sale under said judgment of foreclosure and said order of sale issued therein, is not subject to foreclosure of any kind of lien against Peter McClelland, Jr., and is not subject to sale under such foreclosure or otherwise for the payment of the individual debts of Peter McClelland, Jr., as adjudicated therein, and that in view of the said decision of the said United States Circuit Court of Appeals, said property or the remainder interest of

said Peter McClelland, Jr., may or may not be subject to sale under said order of sale so levied thereon by said Sheriff, for the payment of the debts so adjudicated in said judgment against the said Peter McClelland, Jr., and that should a sale thereof be had under said order of sale in the present conditions and uncertainty of the construction of said will and a final adjudication of the rights of the respective parties thereto, that the same will be made at a great sacrifice; and in case it should be held that said first named parties above designated as the heirs at law of said Peter McClelland, Deceased, are entitled to receive the same upon the expiration of said trust, that such sale would cast a cloud upon their title, and in case it should be held that the same should be delivered by this trustee at the expiration of said trust to said Peter McClelland, Jr., and said F. M. Etheridge and J. M. McCormick, that under the conditions as now exist in relation to said property which is being administered by this trustee under the terms of said will, same is not at this time subject to sale for the debts of said Peter McClelland, Jr., and that such sale will cast a cloud upon the title of said Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick, and in either event will cause said estate and the parties who may ultimately be entitled to receive the same, great and irreparable injury should the sale of said property levied upon, or any other of the property of said estate be allowed to be sold under present conditions for the payment of the debts of the said Peter McClelland, Jr.

Wherefore he submits to the Court, if it is not his duty as such trustee, to interpose herein in the interest of said trust estate, and of all parties interested therein, for the direction and guidance of this Court in the proper administration of his said trust; and in deference to what he conceives to be his duty as such trustee, he invokes the equity

powers of this Court for the protection of said trust estate, and prays the Court for its most gracious writ of injunction against said defendants, W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, independent executrix of the estate of W. D. Herring, Deceased, Laura Beall Bagby and her husband W. H. Bagby and the said S. S. Fleming, Sheriff of McLennan County, Texas, restraining and compelling them and each of them to desist from making said sale of said property, or otherwise levying upon, or interfering with any of the property of said estate until the final adjudication of the rights of the parties interested therein can be had, and for all such other orders and decrees herein as the Court may deem right and proper in the premises.

MARSHALL SURRATT,
Attorney for Plaintiff.

I, John K. Rose, plaintiff in the above and foregoing petition do solemnly swear that the facts set forth in the said petition are true, except those alleged upon information and belief, and that as to such allegations, I believe them to be true.

JOHN K. ROSE.

Sworn to and subscribed before before me this 31st day of May, 1916.

(Seal)

M. S. JENNINGS,
Notary Public McLennan County, Texas.

EXHIBIT A.

"In the name of God, amen. I, Peter McClelland, Sr., of the County of McLennan and State of Texas, knowing the uncertainty of life and the certainty of death, and being of sound and disposing memory, do make this, my last will and testament:

"Item 1. I commit my soul to the God who gave it, trusting in His mercy, and my body to the earth from whence it came.

"Item 2. Should I owe any just debts at my death, I desire that my executors shall pay the same out of any money on hand, and, if there should be no money on hand, then out of the income of my estate, as soon as the same can be done.

"Item 3. I give and bequeath to my beloved wife, Joanna M. McClelland, should she survive me, the homestead we now occupy, in the western subrubs in the City of Waco, —the same that I purchased of Wm. Stone, to be held, used, and enjoyed by her during her natural life. I also give and bequeath to my said wife all the household and kitchen furniture, plate, tableware, pictures, ornaments and other personal property used in and about said homestead, and also the carriages, horses, and milk cows that I may die possessed of. I also give and bequeath to my said wife the sum of One hundred and fifty dollars per month, or so much thereof as she may see fit to use, during her natural life, should she survive me, to be paid to her in monthly installments, for her support and maintenance, by my executors hereinafter named, in cash, from the date of my death, which shall be a charge upon my estate.

"Item 4. I give and bequeath to my beloved son Peter McClelland, Jr., should he survive me, all the residue of my estate, real, personal, and mixed, to be received however, and enjoyed by him only in future, upon the terms, conditions, incumbrances, trusts and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of said son during the said period of twenty-five years, should he live so long.

"Item 5. I also give and bequeath to my said son, Peter, one hundred dollars per month, to be paid to him from and

after the date of my death, in cash, for his maintenance and support, in monthly installments, so long as he shall remain single, or until he shall come into possession of my estate as herein provided; but should my said son marry before or after my death, this special legacy shall be increased to one hundred and fifty dollars per month from and after the date of such marriage, to be paid to him in cash in monthly installments for his maintenance and support after my death, by my executors, as herein provided, which shall be a charge upon my estate until he comes into the possession of same as herein provided, or dies; and in case of such marriage my executors shall provide, by purchase or otherwise, for my said son, Peter, out of my estate, a suitable house for him to live in, including lots, grounds, and outbuildings, without charge to him, not to exceed in value the sum of five thousand dollars, if purchased by said executors for his use and enjoyment; but upon the death of my said wife, Joanna, my said son, Peter, having first so married, may at his option, move into, live at and enjoy the homestead bequeathed to her during her life free of charge, in lieu of any other provisions for a home, until he shall come into the possession of my estate according to the provisions of this will.

"Item 6. I hereby appoint John E. Gilbert, Chas. F. Gilbert and Amos W. Gilbert, citizens of the county of McLennan and State of Texas, my executors to carry out the terms and execute the trusts provided for in this will; and as I repose full confidence in their honesty, fidelity, and ability, I desire that no bond shall be required of them. Should any one of the said executors leave the State of Texas and remain away for more than two years at one time, he shall thereupon be disqualified from further acting as such executor; and in that event, or if any executor is disqualified to act from any other cause, or if there be a vacancy caused by death or other cause, any two of my other executors may

appoint a third, and fill such vacancy by appointment in writing, to be filed among the records of the county court of McLennan County, with the papers pertaining to the probate of my will; but should two or more vacancies occur at one time, then the County Court of McLennan County shall appoint an executor or executors with the will annexed, to carry out the trusts herein provided for, which executor or executors so appointed with such original executor as may be then acting, shall be required by said court to give bond in due form of law. The absence of all the executors from the state of Texas at one time for more than six months, or the absence of two of them at one time for more than one year, shall disqualify those so absenting themselves, and the court shall then appoint others as herein provided.

"Item 7. Upon my death it is my desire that my said executors or either of them, have this will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my estate returned into court according to law, and that the same be recorded, and that no further action be had in the County Court in reference to my estate except as herein provided. If at my death it should appear that any of the above named executors have died before me, or if from any cause, or either of them, are disqualified from accepting and executing the trusts herein provided for, then such vacancies shall be filled as above provided for.

"Item 8. Upon my death and after the probate of this will, as aforesaid, my executors accepting and qualified to act as aforesaid, are hereby authorized and empowered to take possession of my entire estate whether in money, real estate, personal or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms, and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long;

and at the expiration of twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same; but should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges and incumbrances herein created, according to the laws of the State of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living.

"Item 9. It is my desire that my executors, shall collect the rents promptly on my rent paying real estate, and that they shall collect also all other incomes of my estate, from any and all other sources, from the date of my death, during the continuance of the trusts herein provided for, for the period of twenty-five years, and that they will pay out of such income all taxes that may become due; that they will insure, and pay for the same, all the buildings on the real estate belonging to my estate; that they will pay all legacies, bequests, and charges upon my estate herein created and provided for, and will pay all other charges that may become necessary to preserve and protect said estate, in their judgment; that they will prosecute and defend suits, if necessary to protect said estate, and pay all such costs and charges as may be necessary in their judgment, and may employ and pay counsel for litigation and advice in the preservation and care of said estate, or in making investments of the income of same, as in their judgment may seem best for the interests of my estate. And in case repairs become necessary or ordinary improvements calculated to retain renters or increase the rents of the estate, they shall make the same as in their

judgment may seem best for the interests of the estate. Should any buildings or other improvements be destroyed by fire or otherwise, they, my said executors, are hereby authorized to rebuild the same, as to them may seem best for the interests of my estate, and payable out of the income thereof by my said executors. My said executors are authorized and empowered to retain out of all moneys that come into their hands from the income of said estate, or other sources, five per centum upon the gross receipts, as a compensation for their care of same, and for executing the trusts herein provided for.

"Item 10. After the payment of said legacies and charges aforesaid as they may accrue and become due, it is my desire that the residue of the income of my estate, as it accrues, shall be deposited in the State Central Bank, doing business in the city of Waco, if it be then in business, of which I am a stockholder; and whenever such deposits or cash on hand in the hands of my said executors, shall amount to the sum of five thousand dollars, I desire that my said executors shall purchase capital stock of said State Central Bank, and hold the same as assets of said estate, collecting dividends as the same may be declared, and reinvesting whenever the said sum of five thousand dollars may be on deposit or in the hand for the credit of my estate as aforesaid. But my said executors are especially authorized and empowered to invest the surplus income of my said estate in government securities, or in rent-paying real estate, as in their judgment may seem best for the interests of said estate, or they may invest in unimproved real estate in the county of McLennan, or City of Waco, in the State of Texas, and may improve the same, or may improve any unimproved property of the estate, as may seem best to them, in their judgment, for the interests of the estate.

"Item 11. All other wills or parts of wills, or codicils to the same, heretofore made by me, are hereby revoked.

"In testimony whereof I have hereunto set my hand this the 22nd day of October A D 1881, and declared this to be my last will and testament. P. McCLELLAND.

"Signed and executed in the presence of the following witnesses who sign and witness the same in the presence of the testator and of each other, and at the testator's request.

J. T. WALTON
JNO. T. FLINT.

CODICIL.

"Codicil in lieu of items sixth and seventh of the foregoing will:

"(1) I, Peter McClelland, Sr., now here revoke clause (item 6) sixth of my foregoing will, executed and dated on the 22nd day of October A D 1881, and now here appoint John E. Gilbert and William L. Prather citizens of the County of McLennan and State of Texas, my executors to carry out the terms and execute the trusts provided for in my foregoing will; and as I repose full confidence in their honesty, fidelity and ability, I desire that no bond shall be required of them. Should either of my executors leave the State of Texas, and remain away for more than one year at a time, or fail to accept such executorship upon my death, such executor shall thereafter be disqualified from further acting as such. My estate shall not be considered vacant so long as either of said executors continue to act, but in case of death, resignation, failure to act, or of the disability of both of my said executors, then the county court of McLennan County shall appoint an executor with the will annexed to carry out the provisions of said will and trusts therein provided for, which executor so appointed shall be required to give bond as provided by law.

"(2) And I now here revoke item seventh of my will, and in lieu thereof I desire upon my death that my said executors or either of them, have my said will probated in due form of law, and that they or either of them, have a full and complete inventory and appraisement of my said estate returned into court according to law, and that the same be recorded, and that no further action be had in the County Court in reference to my estate except as provided in said will or herein, and this codicil now here is make (made) a part of said will as fully as if it had been originally incorporated herein. Upon further consideration, I desire after my death and the death of my wife, that my son Peter McClelland, may occupy and enjoy my homestead, if he chooses to do so, but upon the condition that he first convey back to my estate the homestead I have given him on Hogan Hill. In case he does not do so, then my homestead, upon the death of my wife, shall pass to the possession of my executors, to be administered as provided for the balance of my estate. I further desire to continue the trusts created herein in my executors for and during the natural life of my son, Peter; but if in their judgment he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him in said will.

"In testimony whereof I hereunto set my hand this 17th day of August 1886, and declare it to be my last will and codicil in presence of the subscribing witnesses hereto.

P. McCLELLAND.

"Signed in our presence, and declared by the testator, in our presence, to be his last will and codicil thereto.

JNO. T. FLINT
D. S. WOOD
W. N. ORAND."

The above petition for suit of injunction was on this day presented to me and I decline to act on the same, because disqualified, as I was of counsel for said J. K. Rose Trustee, and Hugh McClelland, Mrs. M. E. Grismer, Otis McClelland, and Hugh L. Grismer, in the case of Peter McClelland Jr. Versus said parties lately decided in the United States Court, being the case referred to in this petition, and also was one of the counsel to the case of McClelland Vs McClelland reported in 101 S. W. R. page 1171, and for the further reason that I have been consulted by and have given advice to the said J. K. Rose Trustee, as to the matters in dispute set out in this petition this 31st May 1916.

RICH'D I. MUNROE,
Judge 54th, Judicial District.

JOHN K. ROSE, *Trustee*

vs

W. H. HOFFMAN Et Al.

On this 31st day of May 1916, came on to be heard the petition filed in this cause, and the same having been duly considered it is ordered that the injunction prayed for therein be, and the same is hereby granted, to remain in force until further orders herein, and that the Clerk of the District Court of McLennan County, do issue a writ of injunction restraining defendants in terms as prayed for, until further order herein returnable to the 54th District Court of McLennan County, upon plaintiff entering into bond in terms of the law in the sum of $500.00.

And, it appearing that all the parties mentioned in paragraph 11 and 12 of said petition, and if any of them be dead, their heirs at law, as well as all other heirs at law of Peter McClelland, deceased, if there be others, are proper

and necessary parties to this suit, it is ordered that all such persons be and the same are hereby made parties hereto, and the said clerk is ordered to issue legal notices and citations to all of said parties, and the plaintiff herein is ordered to make diligent inquiry to ascertain the names and residences of all such heirs, and if any there be whose names are not included in said petition, that he amend the same making them parties hereto, and that the clerk issue proper citations or notices to such persons herein as parties to this cause and they are hereby required to appear herein to prosecute or defend their rights, if any they have, in or to any of the properties or rights set up in said petition.

E. J. CLARK,
Judge 74th, Dist. Court.

THE STATE OF TEXAS,
County of McLennan

I, R. V. McClain, Clerk of the District Court of McLennan County, Texas, do hereby certify that the foregoing is a true and correct copy of plaintiff's original petition in Cause No. 6480 John K. Rose, Trustee, vs. W. H. Hoffman, et al as same appears now on file in said Court.

Given under my hand and the seal of said Court, at office in Waco this 31 day of May, 1916.

(Seal) R. V. McCLAIN, Clerk.

THE STATE OF TEXAS

To the Sheriff or Any Constable of Dallas County, Greeting:
ing:

You are hereby commanded to summon F. M. Etheridge and J. M. McCormick to be and appear before the Honorable 54th District Court of McLennan County, Texas, at the next regular term thereof, to be holden at the Court House in Waco, on the fourth Monday in September, 1916,

same being the 25th day of September, 1916, then and there to answer the Plaintiff's petition, filed in a suit in said court on the 31st day of May, 1916, wherein John K. Rose, Trustee, is plaintiff, and W. H. Hoffman, Robert H. Rogers, D. A. Kelly, Anna G. Herring, Independent Executrix of the estate of W. D. Herring, deceased, S. S. Fleming, Sheriff, are Defendants. File number of suit being No. 6480. The nature of Plaintiff's demand is as follows, to-wit: Being a suit to restrain the defendant S. S. Fleming, Sheriff, from selling under order of sale, issued out of the 54th Judicial District Court of McLennan County, Texas, on the 9th day of May, 1916, lots Nos. 1, 2, 3, and 4, in Block No. 6, in the City of Waco, McLennan County, Texas, said order of sale being issued out of cause No. 6258, styled W. H. Hoffman, et al vs Peter McClelland, Jr., and restraining the defendant Hoffman, Rogers, and Anna G. Herring, Executrix, Laura Beall Bagby, and W. H. Bagby, from making said sale of said property or otherwise levying upon or interfering with any of the property out of the estate of Peter McClelland, deceased, and also to construe the will of Peter McClelland, deceased, and codicil thereto attached, made on the 22nd day of October, 1881, and the 17th day of August, 1886, respectively. For other and further particulars concerning plaintiff's cause of action, see certified copy of plaintiff's original petition hereto attached and made part hereof. And you will deliver to said Defendants F. M. Etheridge and J. M. McCormick, each, in person, a true copy of this Citation (together with the accompanying certified copy of the Plaintiff's Petition).

Herein Fail Not, but have you before said Court, on the said first day of the next term thereof, this Writ, with your return thereon showing how you have executed the same.

Given under my hand and the seal of said Court, at office in Waco, Texas, this the 31st day of May, 1916.

R. V. McCLAIN, *Clerk,*

(Seal) District Court, McLennan County, Texas.
By MARY GOLDBERG, *Deputy.*

(Endorsed as follows, to-wit:) File No. 6480, District Court of McLennan County, Texas, September Term, 1916. Citation. J. K. Rose, Trustee vs. W. H. Hoffman et al. Served on me on June 1, 1916. J. M. M. Issued May 31st, 1916. R. V. McClain, District Clerk. By Mary Goldberg, Deputy.

"EXHIBIT B"

JOHN K. ROSE, *Trustee*

vs. No. 6480

W. H. HOFFMAN, Et Al

In the 54th Judicial District Court, McLennan County Texas.

Now comes S. L. Huston, Wm. Cline, A. H. Cline, Fred C. Cline, May Cline Babcock, Alice Brinkerhoff joined by her husband Henry Brinkerhoff, Etta May Perisho, Geo. D. Murphy, Nellie Shearer, Chas. A. Cline, G. V. Cline, John M. Cline, Ollie Bennett, and Elizabeth Zimmerly (erroneously spelled Zummerly in plaintiff's petition), all of whom reside in Edgar County, Illinois, Josephine Alexander and her husband J. W. Alexander, Katie Goodman and Freddie Goodman, who reside in Cole County, State of Illinois, and made parties hereto by order entered herein on the 31st day of May, 1916, at the suggestion of plaintiff herein, and enter their appearance herein as required by said order, and represent to the court, that:

They and the other persons made parties hereto named in paragraph 11, of plaintiff's petition, are the collateral heirs and the descendants and heirs of such collateral heirs living at the death of Peter McClelland, deceased, and the persons contemplated and described in the last will and testament of Peter McClelland, deceased, a true copy of which is attached to plaintiff's petition herein, and designated therein as "my heirs at law", and are the sole legatees thereunder, subject to the trust therein created, of the entire estate of said Peter McClelland, deceased, consisting of the several tracts and parcels of land described in exhibit A hereto attached as part of this petition, and also all the accumulations therefrom and thereof as now held by plaintiff as trustee and that will be so held by him at the end of said trust, and to whom, by the terms of said will, said trustee is required, at the end of said trust, to turn over and deliver said entire estate and property clear of the trust, charges and encumbrances therein created.

They further allege that Peter McClelland, Jr., has no interest, right, title or claim to the corpus of said property or any part thereof, and that lots 1, 2, 3, and 4, in Block 6, of the City of Waco, upon which the defendants herein, as set out in plaintiff's petition, have procured a foreclosure of an attachment lien in this court in cause No. 6258, W. H. Hoffman et al vs Peter McClelland, Jr., against said Peter McClelland, Jr., wherein they procured a judgment against said Peter McClelland Jr., for the sum of Seven Thousand Five hundred sixty-seven and 54/100 dollars ($7567.54) with interest and costs of suit, and the foreclosure of an alleged attachment lien as aforesaid, to secure the payment thereof, and upon which said defendants caused an order of sale to be issued on the 9th day of May, 1916, and placed in the hands of defendant S. S. Fleming, Sheriff of McLennan County, Texas, for execution, and by him

levied upon said lots, and under which he has advertised said lots for sale on the first Tuesday, being the 6th day of June, 1916, at public vendue, as the property of the said Peter McClelland, Jr., is a portion of the property belonging to said estate, and that Peter McClelland, Jr., does not own and has no right, title, interest or claim to said property, and that the same was not subject to levy of the attachment procured by said defendant against said Peter McClelland, Jr., nor to sale for the payment of the debts of said Peter McClelland, Jr., and that the levy of said attachment issued in said cause on said lots as the property of said Peter McClelland, Jr., and the judgment rendered therein, and the order of sale issued thereon and the levy upon and advertisement of said property for sale as the property of said Peter McClelland, Jr., by defendant S. S. Fleming, Sheriff, each and all constitute a cloud upon the title of these pleaders and all others of the said "heirs at law" of the said Peter McClelland, deceased, as comprehended and designated in his said will, and that should said defendants be permitted to sell said property as the property of Peter McClelland, Jr., under said order of sale, that the same will constitute a further cloud upon their title to said lots, and cause said "heirs at law", including these pleaders, great and irreparable injury.

Wherefore they now come and in behalf of themselves and all other "heirs at law" as aforesaid and descendants and heirs of said "heirs at law" of the said Peter McClelland, deceased, and pray that they be permitted and allowed to prosecute this suit against the defendants herein in behalf of themselves and also all other "heirs at law" of the said Peter McClelland, deceased, and their descendants and heirs, until such time as said others can be brought in, and also to so prosecute and defend their claim of title to said property against the said Peter McClelland, Jr., J. M. Mc-

Cormick and F. M. Etheridge, also made parties hereto, and that the temporary injunction heretofore issued by the court herein restraining said defendants from selling said property be made perpetual, and that the cloud cast upon their title to said lots as aforesaid be removed.

They also allege that the said Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge are asserting and claiming that they are the sole owners of all the property of said estate of Peter McClelland, deceased, as now held in trust by the plaintiff herein, each of whom are asserting claim thereto under and through the said will of the said Peter McClelland, deceased, and that they, the said Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge have the right to sell, alienate and dispose of the same in any manner; and the said Peter McClelland, Jr., has heretofore to-wit: on the 11th day of November, 1913, executed his deed of that date, recorded in McLennan County deed records, Book 265, page 354, purporting to convey to said J. M. McCormick and F. M. Etheridge an undivided one-third interest in and to all the said property belonging to said estate, including said lots 1, 2, 3, and 4, in Block 6, in the City of Waco, McLennan County, Texas, and that said Etheridge and McCormick are asserting ownership in themselves of said one-third interest in and to said property, and that such claim so asserted, and said deed have created a cloud upon their, these pleaders' title, and that of each of the other "heirs at law" and their descendants and heirs of the said Peter McClelland, deceased, as designated in his said will.

And they further represent to the court that their right to a recovery herein as alleged is derived through and based upon the said will and codicil of Peter McClelland, deceased, when taken and considered as one instrument, and that in making the same the said Peter McClelland, deceased, in-

tended to make them and said other heirs at law of the said Peter McClelland, deceased, being his collateral kindred, and their descendants and heirs at law, the only and sole legatees thereunder of the entire residue of his estate, and of the accumulations thereof after payment of the charges of every kind provided in said will, to be delivered to them and their heirs at the expiration of the trust therein created; and that in view of the different construction given said will and codicil by the courts of Texas, and the United States Circuit Court of Appeals for the 5th Circuit in the several cases as alleged in plaintiff's petition, that there is or may be some ambiguity in the terms of said will and codicil as to the true intent and purpose of said Peter McClelland, deceased, in making his said will and codicil, but they further allege that when the same are read in the light of the environments of the said testator at the time he made said will and at the time he made said codicil, his intention to bequeath his entire estate with the accumulations thereof to his collateral heirs designated therein as "my heirs at law" is made manifest.

They allege that at the time he made said will, that he was an old man, and had spent practically all his life in Waco in making and accumulating his fortune, and that his controlling passion in life was the love of property and its accumulation and that his son, Peter, Jr., was always secondary in his thoughts to his property. That at the time he made said will, his said son was a spendthrift, weak minded, unable, or at least unwilling to attend school and accept an education, with little or no disposition to attend to business or to make or to save money, although his said father had done and attempted to do all that could be done by father for a son, to educate and instill in him business ideas and habits.

That at the time said codicil was made said Peter Mc-

Clelland, Jr., had reached the age of 31 years, and his habits of profligacy and mental condition had not improved with years, as had been contemplated by his father in making said will, but on the contrary, his weakness and spendthrift habits, want of capacity to make and hold property became more and more apparent and he became less considerate of his father's feelings, wishes or property interest, was easily influenced by designing men, and his profligate habits seemed to grow upon him with increasing age, and had formed alliances extremely disagreeable to said father Peter McClelland, in which his said father believed him to have been inveigled by designing parties for the purpose of becoming possessed of his fortune after his death, and the said Peter McClelland, deceased, was greatly tormented at and before the time he made the codicil, with the thought that his son Peter would in some manner get possession of his property and waste and squander it. That the relations between said father and son had become greatly strained, to such an extent that Peter, Jr., seemed to have lost all care for his father and was regarded by his father as having no feeling for him, and at the time of making said codicil there was bitterness existing between Peter, Jr., and his said father. That his said father at that time was firmly impressed with the idea that if his said son ever became vested with any sort of title or interest in any portion of his said property whereby he would be authorized to handle or dispose of the same, that he would squander such property without benefit to himself, and was not and never would be mentally capable to manage, control or dispose of the same or any interest therein. That on the contrary, affectionate relations existed between Peter McClelland, deceased, and his collateral kindred mentioned in his said will as 'my heirs at law", and especially as to Mrs. Grismer, his niece, and Hugh McClelland, his nephew, who lived near Waco, and Mrs. Huston, his sister who lived in Illinois, to whom, and others of

his collateral kindred, he was and had been closely attached; and that he, in this frame of mind and under such and such-like surrounding circumstances and conditions, called in his attorney to prepare a codicil to his said will to so change the same that his said son, Peter, should not, at any time, have or own therein, any right, title, interest or claim to his property, and that same should go, under the terms thereof, to his said "heirs at law", and that same was so prepared and executed by him with that intent and purpose.

Wherefore they pray in behalf of themselves and all others of the said "heirs at law" and their descendants and heirs for whom they may be permitted to prosecute this suit or that may hereafter join herein, for citation to the said Peter McClelland, Jr., who is a resident citizen of the County of Los Angeles, State of California, and the said F. M. Etheridge and J. M. McCormick, who reside in Dallas County, State of Texas, on this cross action and upon final hearing for judgment establishing their said claim to said property, and decreeing that the said Peter McClelland, Jr., and F. M. Etheridge and J. M. McCormick have no interest therein or thereto, and that the cloud cast upon their title to said property by the claim and acts aforesaid of the said Peter McClelland, Jr., and F. M. Etheridge and J. M. McCormick, be removed, and that they be quieted in their title, and that the plaintiff herein, John K. Rose, Trustee, be ordered and directed upon the expiration of said trust, viz: at the death of the said Peter McClelland, Jr., to turn over and deliver free and clear of said trust and all other encumbrances created thereby, all of said property of every sort and character that may be at that time in his possession as such trustee, to them, the said "heirs at law" of Peter McClelland, deceased, and to the descendants and heirs of those who may be then dead, according to the terms of the said

will, and for all such other and further relief to which they may be entitled in either law or equity.

STRIBLING & STRIBLING,
J. F. BRINKERHOFF
Attorneys for Said First Named
"Heirs at Law", and Their Heirs.

"EXHIBIT A"

List of land belonging to Estate of Peter McClelland, deceased, now in possession of John K. Rose, Trustee. All located in McLennan County, Texas.

1. Three-fourths undivided interest in lots 6 and 7 in block 4 of the City of Waco, known as the McClelland Hotel property.

2. A part of lots 8, 9, 10, 11 and 12 in Block 4, fronting 75 feet on the east side of 4th Street and running back across said lots on and adjoining the north side of the alley through said block, 240 feet.

3. Lots 1, 2, 3, and 4, of block 6, fronting on the southeast side of Austin Street between 4th and 5th Streets.

4. Lots 10 and 11 in Block 7, fronting 100 feet on the north side of Franklin Street extending back 165 feet to the alley.

5. Part of Farm Lot 46, fronting 160 feet on North 15th street and extending back adjacent to and between Jefferson and Barnard Streets 250 feet.

Each of said lots and pieces of property being situated in the City of Waco.

6. 477.5 acres of land, a part of sections 1 and 2, range 7, and a part of Range 8, section 2 of the subdivision of the Thomas de la Vega 11 league grant in said county on Te-

huacana and Trading House Creeks, conveyed to John K. Rose, Trustee, of the estate of Peter McClelland, deceased, by Robert B. Orum and wife, by deed of date, Dec. 10, 1914, and recorded in McLennan County, Deed Records, Book 271, page 565.

THE STATE OF TEXAS
County of McLennan.

I, R. V. McClain, Clerk of the District Court, in and for McLennan County, Texas, hereby certify that the above and foregoing is a true and correct copy of cross bill of S. L. Huston, et al, in Cause No. 6480, John K. Rose, Trustee, vs W. H. Hoffman, et al, as same appears on file in my office.

Witness my hand and seal of said Court, at office in the City of Waco, this the 12th day of June, A. D. 1916.

(Seal) R. V. McCLAIN,
Clerk District Court, McLennan County, Texas.
By MARY GOLDBERG, Deputy.

THE STATE OF TEXAS

To the Sheriff or Any Constable of Dallas County, Greeting:

You are hereby commanded to summon J. M. McCormick and F. M. Etheridge to be and appear before the Honorable 54th District Court of McLennan County, Texas, at the next regular term thereof, to be holden at the Court House in Waco, on the Fourth Monday in September, 1916, same being the 25th day of September, 1916, then and there to answer the cross action of S. L. Huston, Wm. Cline, A. H. Cline, Fred C. Cline, May Cline Babcock, Alice Brinkerhoff joined by her husband Henry Brinkerhoff, Etta May Perisho, Geo. D. Murphy, Nellie Shearer, Chas. A. Cline, G. V. Cline, John M. Cline, Ollie Bennett and Elizabeth

Zimmerly (erroneously spelled Zummerly in plaintiff's petition), Josephine Alexander and her husband J. W. Alexander, Katie Goodman and Freddie Goodman, against Peter McClelland, Jr., F. M. Etheridge, and J. M. McCormick, filed in a suit in said Court on the 12th day of June, 1916, wherein John K. Rose, Trustee, is plaintiff, and W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, independent executrix of the estate of W. D. Herring, deceased, S. S. Fleming, Sheriff of McLennan County, Texas, and Laura Beall Bagby and her husband W. H. Bagby, are defendants; and to which the said plaintiffs in said cross action and the said Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick were made parties by order of the Court therein.

File number of said suit being No. 6480.

The nature of the demand of said cross-action of S. L. Huston, Wm. Cline, A. H. Cline, Fred C. Cline, May Cline Babcock, Alice Brinkerhoff, joined by her husband Henry Brinkerhoff, Etta May Perisho, Geo. D. Murphy, Nellie Shearer, Chas. A. Cline, G. V. Cline, John M. Cline, Ollie Bennett, and Elizabeth Zimmerly (erroneously spelled Zummerly in plaintiff's petition), Josephine Alexander and her husband J. W. Alexander, Katie Goodman and Freddie Goodman, is as follows, to-wit:

That the above named parties and others named in plaintiff's petition, as coming within the designation of the term used by Peter McClelland, deceased, in his will as "my heirs at law" and their descendants and heirs, are the owners of the remainder in fee of lots 1, 2, 3 and 4, in Block 6, in the City of Waco, levied upon and advertised for sale by the defendants herein, and all other property belonging to the estate of Peter McClelland, deceased, and now in the possession of John K. Rose, Trustee, and that the defendants

in their cross action, Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge, have no right, title, interest or claim in and to any of said property, and that they are asserting claim thereto, under the last will and testament of Peter McClelland, deceased, which casts a cloud upon their title, which they pray be removed, and also praying for a construction of said will.

For other and further particulars concerning said cross-bill, see certified copy of said cross-bill hereto attached and made part hereof.

And you will deliver to said defendants J. M. McCormick and F. M. Etheridge, each, in person, a true copy of this Citation, (together with the accompanying certified copy of said cross-action).

Herein fail not, but have you before said Court, on the said first day of the next term thereof, this Writ, with your return thereon, showing how you have executed the same.

Given under my hand and the seal of said Court, at office in Waco, Texas, this the 13th day of June, 1916.

(Seal) R. V. McCLAIN,
Clerk District Court, McLennan County, Texas.
By MARY GOLDBERG, Deputy.

(Endorsed as follows, to-wit:) No. 6480. John K. Rose, Trustee, vs. W. H. Hoffman, et al. Citation. In District Court, McLennan County, Texas, September Term, 1916. Issued June 12th, 1916. R. V. McClain, Clerk District Court, McLennan County, Texas. By Mary Goldberg, Deputy.

"EXHIBIT C"

JOHN K. ROSE, *Trustee,*

vs. No. 6480

W. H. HOFFMAN Et Al.

In the 54th Judicial District Court.
McLennan County, Texas.

To the Honorable Judge of Said Court:

Now comes John K. Rose, Trustee of the estate of Peter McClelland, deceased, plaintiff herein, and, in obedience to the order of the Court granting the injunction herein entered on the 31st day of May 1916, respectfully represents to the Court:

I.

That he has made diligent search and inquiry to ascertain the names and residences of all persons who come within the designation of the term "my heirs at law", as used by Peter McClelland, deceased, in his last will and testament as a designation of persons, who, under certain conditions, were legatees thereunder, and were designated in said will, under said term, as such legatees, as fully set forth in plaintiff's original petition herein filed, and, upon such inquiry he has been informed that a number of such parties as set out in plaintiff's original petition are dead, and a number of other names incorrectly stated therein, and plaintiff here now alleges that the names and residences of all such persons as come within such designation of "my heirs at law", their heirs and legal representatives, so far as he has been able to obtain the same, and who, he prays may be made parties hereto and cited to appear herein and assert their claims, if any, to the estate of Peter McClelland, deceased, are as follows:

Mary Stone, who resides in Jackson County, Missouri, Henrietta McFall Goodson and her husband, Itys Goodson, W. F. McFall, Walker McFall, Stellar Arey and her husband, George Arey, each of whom resides in Caldwell County, Missouri, Leona Dodge and her husband, Robert W. Dodge, who reside in Jefferson County, Nebraska, Nora Armstrong and her husband, Thomas Armstrong, who reside in LaSalle County, Illinois; Mollie Davis and her husband, Fred H. Davis, who reside in Johnson County, Kansas; Cora Bowers and her husband, James C. Bowers, and Don Murray, who reside in Taylor County, Texas, Hugh McClelland, Jr., who resides in Hale County, Texas; Otis McClelland and Hugh L. Grismer, who reside in McLennan County, Texas; Nellie Sherrer and her husband ———— Sherrer, who reside in Potter County, Texas; Mrs. E. H. Johnson, a feme sole, who resides in Brannock County, Idaho, Edna Moehlman and her husband, Paul Moehlman, who reside in Carter County, Oklahoma, R. L. Murray, who resides in Wyandotte County, Kansas, Rebecca Orr, and her husband, Harry Orr, and Guy Murray, who reside in Caldwell County, Missouri, Samuel P. Gray, Jessie Gray Wiley and her husband, Charles Wiley, Mrs. Eugenia Witt, a feme sole, each of whom reside in Harrison County, Missouri; Ibbie Helton, Luna Helton Layson and her husband, Bert Layson, each of whom reside in Harrison County, Missouri; William Gray, who resides in Vernon County, Missouri; Joe D. McClelland, Samuel McClelland, Harriett Hooker, Ellen Parmento and her husband, ———— Parmento, and Mina Rymal, each of whom resides in Caldwell County, Mo.; Gallia A. Jones, who resides in Yellow Stone County, Montana; N. Harriett Pearl, who resides in Gage County, Nebraska; Nuter W. Murphy, William Clinton, George Clinton, C. E. Clinton, Frank Clinton, Eva Hollingsworth and her husband, Felix Hollingsworth; Harriet Swackhammer and Otis Clinton, each of whom resides in Edgar County, Illinois; Montervill Clinton, Inez Clinton

and Ethel Clinton, each of whom resides in _____ County, Missouri; Francis J. Zink, who resides in St. Clair County, Missouri; Susie Clapp and her husband, C. C. Clapp, Ethel Quillen and her husband, W. M. Quillen, Harland S. Huston, Lula Huston and Samuel L. Huston, who reside in _____ County, Oklahoma; Nettie Benbow and her husband, W. C. Benbow, who reside in Washington County, Oregon; William Brinkerhoff, who resides in Edgar County, Illinois; Grover C. Konkler, who resides in Cook County, Illinois; W. C. Konkler, who resides in Vigo County, Indiana; Charles W. Cline and Sam B. Cline, who reside in Fergus County, Montana; E. F. Montgomery and her husband, David Montgomery, who reside in Caldwell County, Missouri; Charles Cline, George V. Cline, John M. Cline, Ollie Bennett and her husband, W. I. Bennett; Catherine Bennett and her husband, Samuel Bennett; Elizabeth Zimmerly and her husband, Sam E. Zimmerly; Rachael A. Kime and her husband John O. Kime, Alvah H. Cline, Fred Cline, William Cline, Alice Brinkerhoff, and her husband, H. H. Brinkerhoff, Etta May Perisho and her husband W. H. Perisho Jr., and George D. Murphy, each of whom reside in Edgar County, Illinois; Versa Murphy and Delbert Murphy, who reside in Polk County, Arkansas; Mollie Goodman, Bert Goodman, Josie Goodman Collins, Maude Vermillion and her husband, Arthur Vermillion; Nell Goodman and Charles Goodman, each of whom reside in Caldwell County, Missouri; Minnie Raymond and her husband _____ Raymond, who reside in Charles Mix County, South Dakota; Fred Goodman, who resides in Pottawattamie County, Iowa; Samuel E. Goodman, Grace O'Bryant and her husband _____ O'Bryant, who reside in the State and County of New York; William Goodman, who resides in Pottawattamie County, Oklahoma; Perry Brown, who resides in Clay County, Missouri; Rebecca Braymer and her husband, Edward Braymer, Cora Brown, Mamie Brown and Jennie Brown, each of whom resides in Caldwell

County, Missouri; John A. Bryant, Frank B. Bryant, Elizabeth Bryant Hall, J. L. Bryant, surviving wife of Alfred Bryant, and C. A. Lowry, each of whom resides in Cook County, Illinois; Clyde B. Lowry, who resides in Jefferson County, Missouri; Elgie L. Fisher and Mossie Lowry, each of whom reside in Cook County, Illinois; Margaret Baird, who resides in Vermillion County, Illinois; Mrs. A. G. Murray and her husband, A. G. Murray, who reside in ———— County, Louisiana; Josie Alexander and her husband J. W. Alexander; Kate Goodman and Fred Goodman, each of whom resides in Coles County, Illinois; William Goodman, who resides in Tulsa County, Oklahoma; Charles Goodman, who resides in Shelby County, Tennessee; R. E. Goodman, who resides in Cook County, Illinois; and Oscar F. Goodman, who resides in Cumberland County, Illinois.

I, John K. Rose, Trustee, plaintiff in the above entitled cause, being duly sworn, state upon oath that each of the above named parties, except those stated therein to be residents of the State of Texas, are non-residents of the State of Texas, and he prays that each of said parties be cited by publication as required by law.

JOHN K. ROSE, Trustee.

Sworn to and subscribed before me this the 16th day of October A. D. 1916.

E. A. DEATON
Notary Public McLennan County, Texas.

II.

Plaintiff further represents that the above named parties are all of those now living who are the descendants and heirs of the brothers and sisters of Peter McClelland, deceased, whose names and residences he has been able, up to this time, to obtain, who were the heirs at law of Peter McClelland, deceased, at the time of his death, and the heirs and

legal representatives of such heirs at law of said Peter McClelland, deceased; but that he has ascertained that many of the heirs at law of the said Peter McClelland, deceased, are dead, or unknown to him, and in addition to the above there are some of the heirs and legal representatives of such heirs at law whose names and residences are unknown to plaintiff, and who, in addition to the above named, are proper parties hereto.

Wherefore, he prays that the unknown heirs of the said Peter McClelland, deceased, and the unknown heirs of Margaret Jane (McClelland) Gray, Sarah (Gray) McFall, Margaret Jane (Gray) Murray; Ann (McClelland) Gray, Thomas Gray Jr., Peter Frank McClelland, Harriett McClelland Jones, Elizabeth McClelland Rymal, Sallie Clinton, William Clinton, Hugh Clinton, Jacob Clinton, Charles Huston, Andrew Cline, Charles Murphy, James A. Goodman, Richard Goodman, John Goodman, Margaret Brown, Mary Goodman Bryant, Frank Bryant, John A. Bryant, Alfred Bryant, and Emma Bryant Lowry, be made parties hereto, and cited as such by publication to appear and answer and assert their rights herein.

I, John K. Rose, Trustee, plaintiff in the above entitled cause, being duly sworn, state upon oath that each of the above named parties so far as this plaintiff is advised, is dead, and that the names and residences of their heirs and legal representatives, except as hereinabove named, are unknown to this affiant.

JOHN K. ROSE, Trustee.

Sworn to and subscribed before me this the 16th day of October A. D. 1916.

E. A. DEATON,
Notary Public McLennan County, Texas.

Wherefore Plaintiff prays that this supplemental petition be received and filed and considered as part and parcel of

his original petition, and especially paragraph 11 thereof, filed herein on the 31st day of May, 1916, and as a part of and in addition to paragraph 11.

MARSHALL SURRATT,
Attorney for Plaintiff.

Plaintiff's 1st Supp. Petition. Filed October 19, 1916.

"EXHIBIT D"

JOHN K. ROSE, *Trustee,*

vs. No. 6480

W. H. HOFFMAN Et Al.

In the 54th Judicial District Court.
McLennan County, Texas.

Now comes S. L. Huston, William Cline, Alvah H. Cline, Alice Brinkerhoff, joined by her husband, Henry Brinkerhoff, Etta May Perisho, joined by her husband, W. H. Perisho, Jr., George D. Murphy, Charles Cline, John M. Cline, Ollie Bennett and her husband, W. I. Bennett, Elizabeth Zimmerly and her husband, Sam E. Zimmerly, Rachel A. Kime and her husband, John O. Kime, William Brinkerhoff, Ethel Quillen, joined by her husband, W. M. Quillen, Harland S. Huston, Susie Clapp and her husband, C. C. Clapp, Lula Huston, surviving wife of Charles H. Huston, deceased, both in her own behalf and as guardian and next friend of her children by said Charles H. Huston, Netta W. Murphy, C. E. Clinton, Frank Clinton, Eva Hollingsworth and her husband, Felix Hollingsworth, all of whom reside in the County of Edgar, State of Illinois; Samuel P. Gray and Jessie Wilie, who reside in Harrison County, Missouri; William L. Gray, who resides in Vernon County, Missouri; N. Hariet Pearl, who resides in Gage County, Nebraska; Nettie Benbow and her husband, W. C. Benbow, who reside

in Washington County, Oregon; Grover C. Konkler, who resides in Cook County, Illinois; W. C. Konkler, who resides in Vigo County, Indiana; Josephine Alexander and her husband, J. W. Alexander, Kate Goodman and Fred Goodman, who reside in Coles County, Illinois; Charles Goodman, who resides in Shelby County, Tennessee; and Oscar F. Goodman, who resides in Cumberland County, Illinois, made parties hereto by order of the court entered herein on the 31st day of May, 1916, at the suggestion of plaintiff herein, and leave of the court being first had and obtained, file this their first amended original appearance and cross bill, in lieu of the original appearance and cross bill filed on June 12, 1916, by some of the above named parties, and represent to the court that:

They and the other persons made parties hereto named in paragraph 11 of plaintiff's petition, and supplemental petition making parties, are the collateral heirs and the descendants and heirs of such collateral heirs living at the death of Peter McClelland, deceased, and the persons contemplated and described in the last will and testament of Peter McClelland, deceased, a true copy of which is attached to plaintiff's petition herein, and designated therein as "my heirs at law", and are the sole legatees thereunder, subject to the trust therein created, of the entire estate of said Peter McClelland, deceased, consisting of the several tracts and parcels of land described in exhibit A hereto attached as part of this petition, and also all the accumulations therefrom and thereof as now held by plaintiff as trustee and that will be so held by him at the end of said trust, and to whom, by the terms of said will, said trustee is required, at the end of said trust, to turn over and deliver said entire estate and property clear of the trust, charges and incumbrances therein created.

They further allege that Peter McClelland, Jr., has no interest, right, title of claim to the corpus of said property

or any part thereof, and that lots 1, 2, 3 and 4, in Block 6 of the City of Waco, upon which the defendants herein, as set out in plaintiff's petition, have procured a foreclosure of an attachment lien in this court in cause No. 6258, W. H. Hoffman et al vs. Peter McClelland, Jr., against said Peter McClelland, Jr., wherein they procured a judgment against said Peter McClelland, Jr., for the sum of Seven thousand five hundred and sixty-seven and 54/100 dollars ($7567.54) with interest and cost of suit, and the foreclosure of an alleged attachment lien as aforesaid to secure the payment thereof, and upon which said defendants caused an order of sale to be issued on the 9th day of May, 1916, and placed in the hands of defendant S. S. Fleming, Sheriff of McLennan County, Texas, for execution, and by him levied upon said lots, and under which he has advertised said lots for sale on the first Tuesday, being the 6th day of June, 1916, at public vendue, as the property of the said Peter McClelland, Jr., is a portion of the property belonging to said estate, and that Peter McClelland, Jr., does not own and has no right, title, interest or claim to said property, and that the same was not subject to the levy of the attachment procured by said defendants against said Peter McClelland, Jr., and that the levy of said attachment issued in said cause on said lots as the property of said Peter McClelland, Jr., and the judgment rendered therein, and the order of sale issued therein and the levy upon and advertisement of said property for sale as the property of said Peter McClelland, Jr., by defendant, S. S. Fleming, Sheriff, each and all constitute a cloud upon the title of these pleaders and all other of the said "heirs at law" of the said Peter McClelland, deceased, as comprehended and designated in his said will, and that should said defendants be permitted to sell said property as the property of Peter McClelland, Jr., under said order of sale, that the same will constitute a further cloud upon their title to said lots, and cause said "heirs at law", including these pleaders, great and irreparable injury.

Wherefore they now come and pray that they be permitted and allowed to prosecute this suit against the defendants herein, and also to so prosecute and defend their claim of title to said property against the said Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge, also made parties hereto, and that the temporary injunction heretofore issued by the court herein restraining said defendants from selling said property be made perpetual, and that the cloud cast upon their title to said lots as aforesaid be removed.

They also allege that the said Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge are asserting and claiming that they are the sole owners of all the property of said estate of Peter McClelland, deceased, as now held in trust by the plaintiff herein, each of whom are asserting claim thereto under and through the said will of the said Peter McClelland, deceased, and that they, the said Peter McClelland, Jr., J. M. McCormick and F. M. Etheridge, have the right to sell, alienate and dispose of the same in any manner; and the said Peter McClelland, Jr., has heretofore, to-wit: on the 11th day of November, 1913, executed his deed of that date, recorded in McLennan County Deed Records, Book 265, page 354, purporting to convey to said J. M. McCormick and F. M. Etheridge an undivided one-third interest in and to all the said property belonging to said estate, including said lots 1, 2, 3 and 4, in Block 6, in the City of Waco, McLennan County, Texas, and that said Etheridge and McCormick are asserting ownership in themselves of said one-third interest in and to said property, and that such claim so asserted, and said deed have created a cloud upon their, these pleaders', title to said property as "heirs at law" of the said Peter McClelland, deceased, as designated in his said will, and their heirs and descendants.

And they further represent to the court that their right to a recovery herein as alleged is derived through and based upon the said will and codicil of Peter McClelland, deceased,

when taken and considered as one instrument, and that in making the same the said Peter McClelland, deceased, intended to make them and said other heirs at law of the said Peter McClelland, deceased, being his collateral kindred, and their descendants and heirs at law, the only and sole legatees thereunder of the entire residue of his estate, and of the accumulations thereof after paymnt of the charges of every kind provided in said will, to be delivered to them and their heirs at the expiration of the trust therein created; and that in view of the different construction given said will and codicil by the courts of Texas, and the United States Circuit Court of Appeals for the 5th Circuit in the several cases as alleged in plaintiff's petition, that there is or may be some ambiguity in the terms of said will and codicil as to the true intent and purpose of said Peter McClelland, deceased, in making his said will and codicil, but they further allege that when the same are read in the light of the environments of the said testator at the time he made said will and at the time he made said codicil, his intention to bequeath his entire estate with the accumulations thereof to his collateral heirs designated therein as "my heirs at law", is made manifest.

They allege that at the time he made said will, that he was an old man, and had spent practically all his life in Waco in making and accumulating his fortune, and that his controlling passion in life was the love of property and its accumulation, and that his son, Peter, Jr., was always secondary in his thoughts to his property. That at the time he made said will, his said son was a spendthrift, weak minded, unable, or at least unwilling to attend school and accept an education, with little or no disposition to attend to business or to make or to save money, although his said father had done and attempted to do all that could be done by father for a son, to educate and instill in him business ideas and habits.

That at the time said codicil was made said Peter Mc-

Clelland, Jr., had reached the age of 31 years, and his habits of profligacy and mental condition had not improved with years, as had been contemplated by his father in making said will, but on the contrary, his weakness and spendthrift habits, want of capacity to take and hold property became more and more apparent, and he became less considerate of his father's feelings, wishes or property interests, was easily influenced by designing men, and his profligate habits seemed to grow upon him with increasing age, and had formed alliances extremely disagreeable to his father, Peter McClelland, in which his said father believed him to have been inveigled by designing parties for the purpose of becoming possessed of his fortune after his death, and the said Peter McClelland, deceased, was greatly tormented at and before the time he made the codicil, with the thought that his son, Peter McClelland, Jr., would in some manner get possession of his property and waste and squander it. That the relations between said father and son had become greatly strained, to such an extent that Peter, Jr., seemed to have lost all care for his father and was regarded by his father as having no feeling for him, and at the time of making said codicil there was bitterness existing between Peter, Jr., and his said father. That his said father at that time was firmly impressed with the idea that if his said son ever became vested with any sort of title or interest in any portion of his said property whereby he would be authorized to handle or dispose of the same, that he would squander such property without benefit to himself, and was not and never would be mentally capable to manage, control or dispose of the same or any interest therein. That on the contrary, affectionate relations existed between Peter McClelland, deceased, and his collateral kindred mentioned in his said will as "my heirs at law", and especially as to Mrs. Grismer, his niece, and Hugh McClelland, his nephew, who lived near Waco, and Mrs. Huston, his sister, who lived in Illinois, to whom, and others of

his collateral kindred, he was and had been closely attached; and that he, in this frame of mind and under such and such-like surroundings, circumstances and conditions, called in his attorney to prepare a codicil to his said will to so change the same that his said son, Peter, should not, at any time, have or own therein any right, title, interest or claim to his property, and that same should go, under the terms thereof, to his said "heirs at law", and that same was so prepared and executed by him with that intent and purpose.

Wherefore, the said Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick, having been heretofore served and filed their answers herein, and citation having heretofore been regularly issued to all the heirs and their descendants who are named in plaintiff's supplemental petition, and the unknown heirs of Peter McClelland, deceased, and their unknown heirs, they pray that upon a final hearing hereof they have judgment perpetuating said injunction and establishing their said claim to said property, and decreeing that the said Peter McClelland, Jr., and F. M. Etheridge and J. M. McCormick have no interest therein, and that the cloud cast upon their title to said property by the claim and acts aforesaid of the said Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick, be removed, and that they be quieted in their title, and that the plaintiff herein, John K. Rose, Trustee, be ordered and directed upon the expiration of said trust, viz: at the death of the said Peter McClelland, Jr., to turn over and deliver free and clear of said trust and all other encumbrances created thereby, all of said property of every sort and character that may be at that time in his possession as such trustee, to them, the said "heirs at law" of Peter McClelland, deceased, and to the descendants and heirs of those who may be then dead, according to the terms of said will, and for all such other and

further relief to which they may be entitled in either law or equity.

J. F. BRINKERHOFF
STRIBLING & STRIBLING
Attorneys for S. L. Huston et al.

1st Amended Orig. Appearance and Cross Bill of S. L. Huston et al. Filed Oct. 31, 1916.

"EXHIBIT A"

List of Land Belonging to Estate of Peter McClelland, Deceased, Now in the Possession of John K. Rose, Trustee, all located in McLennan County, Texas.

1. Three-fourths undivided interest in Lots 6 and 7 in block 4 of the City of Waco, known as the McClelland Hotel property.

2. A part of lots 8, 9, 10, 11 and 12 in block 4, fronting 75 feet on the east side of 4th street and running back across said lots on and adjoining the north side of the alley through said block 240 feet.

3. Lots 1, 2, 3 and 4 of block 6, fronting on the south-east side of Austin Street between 4th and 5th streets.

4. Lots 10 and 11 in block 7, fronting 100 feet on the north side of Franklin street extending back 165 feet to the alley.

5. Part of Farm lot 46, fronting 160 feet on north 15th street and extending back adjacent to and between Jefferson and Barnard streets 250 feet.

Each of said lots and pieces of property being situated in the City of Waco.

6. 477.5 acres of land, a part of sections 1 and 2, Range 7, and a part of Range 8, section 2 of the subdivision of the

Thomas de la Vega 11 League Grant in said County of Tehuacana and Trading House Creeks, conveyed to John K. Rose, Trustee of the estate of Peter McClelland, deceased, by Robert B. Orum and wife, by deed of date Dec. 10, 1914, and recorded in McLennan County Deed Records, Book 271, page 565.

"EXHIBIT E"

J. K. ROSE, *Trustee,*

vs No: 6,480.

W. H. HOFFMAN Et Al.

In the District Court of the 54th Judicial District of the State of Texas.

Come now the defendants, F. M. Etheridge, J. M. McCormick and Peter McClelland, Jr., and for answer to the plaintiff's petition herein say:

I.

The matters and things therein alleged constitute no cause of action as against these defendants or either of them and of this they pray judgment, and as etc.

II.

Said defendants deny all and singular the allegations in plaintiff's petition contained and of this they put themselves upon the country, and as etc.

ETHERIDGE, MCCORMICK & BROMBERG

Attorneys for said Defendants.

Filed Sept. 20, 1916.

"EXHIBIT F"

JOHN K. ROSE, *Trustee,*

vs. No. 6480

W. H. HOFFMAN Et Al.

In the District Court McLennan County, Texas, Fifty-Fourth Judicial District.

Now come defendants herein, W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, executrix of the estate of W. D. Herring, deceased, and S. S. Fleming, Sheriff of McLennan County, and except to the plaintiff's petition and say that the same is insufficient in law and of this they pray judgment of the court.

Further answering herein these defendants deny all and singular the allegations contained in plaintiff's petition and of this they put themselves upon the country.

D. A. KELLEY & ROBERT H. ROGERS,

Attorneys for themselves and also attorneys for defendants herein named who have been served with citation.

Filed Sept. 28, 1916.

LEGAL NOTICES

THE STATE OF TEXAS.

To the Sheriff or Any Constable of McLennan County—Greeting:

You are hereby commanded to summon Mary Stone, Henrietta McFall Goodson, Itys Goodson, W. F. McFall, Walker McFall, Stella Arey, George Arey, Leona Dodge, Robert W. Dodge, Nora Armstrong, Thomas Armstrong, Mollie Davis, Fred H. Davis, Mrs. E. H. Johnson, Edna Moehlman, Paul Moehlman, R. L. Murray, Rebecca Orr, Harry

Orr, Guy Murray, Samuel P. Gray, Jessie Wiley, Charles Wiley, Mrs. Eugenia Witt, Ibbie Helton, Lula Helton Layson, Bert Layson, William Gray, Joe D. McClelland, Samuel McClelland, Harriett Hooker, Ellen Parmento and her husband, ———— Parmento, Mina Rymal, Gallia A. Jones, William Clinton, George Clinton, Harriett Swackhammer, Otis Clinton, Montervill Clinton, Inez Clinton, Ethel Clinton, Mrs. Francis J. Zink, John Huston, Charles W. Cline, Sam B. Cline, E. F. Montgomery, David Montgomery, George V. Cline, Versa Murphy, Delbert Murphy, Mollie Goodman, Bert Goodman, Josie Goodman Collins, Maude Vermillion, Arthur Vermillion, Nell Goodman, Charles Goodman, Minnie Raymond and her husband, ———— Raymond, Fred Goodman, Samuel E. Goodman, Grace O'Bryant, William Goodman, Perry Brown, Rebecca Braymer, Edward Braymer, Cora Brown, Mamie Brown, Jennie Brown, John A. Bryant, Frank B. Bryant, Elizabeth Bryant Hall, J. L. Bryant, C. A. Lowry, Clyde B. Lowry, Elgie L. Fisher, Mossie Lowry, Margaret Baird, Mrs. A. G. Murphy, A. G. Murphy, William Goodman, R. E. Goodman, and also the heirs of Peter McClelland, deceased, Margaret Jane (McClelland) Gray, Sarah (Gray) McFall, Margaret Jane (Gray) Murray, Ann (McClelland) Gray, Thomas Gray, Jr., Ibbie Helton, Peter Frank McClelland, Harriett McClelland Jones, Elizabeth McClelland Rymal, Sallie Clinton, William Clinton, Hugh Clinton, Jacob Clinton, Charles Huston, Andrew Cline, Charles Murphy, James A. Goodman, William Goodman, Richard Goodman, John Goodman, Margaret Brown, Mary Goodman Bryant, Frank Bryant, John A. Bryant, Alfred Bryant and Emma Bryant Lowry, whose names are unknown, by making publication of this citation in some newspaper published in your county, if there be a newspaper published therein, and if not, then in any newspaper published in the 54th Judicial District, and if there be no newspaper published in said judicial district, then in any newspaper published in the near-

est district to said 54th Judicial District, to appear at the next regular term of the 54th Judicial District Court of McLennan County, to be held at the court house thereof, in Waco, *on the 2nd Monday in March,* 1917, *the same being the 12th day of March,* 1917, then and there to answer a petition filed in said court on the 31st day of May, 1916, in a suit numbered on the docket of said court 6480, wherein John K. Rose, trustee of the estate of Peter McClelland, deceased, is plaintiff, and W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, executrix, Laura Beall Bagby, W. H. Bagby and S. S. Fleming, sheriff of McLennan county, are defendants, and wherein Peter McClelland, Jr., F. M. Etheridge, J. M. McCormick, Mary Stone, Henrietta McFall Goodson, Itys Goodson, W. F. McFall, Walker McFall, Stella Arey, George Arey, Leona Dodge, Robert W. Dodge, Nora Armstrong, Thomas Armstrong, Mollie Davis, Fred H. Davis, Cora Bowers, James C. Bowers, Don Murray, Hugh McClelland, Jr., Otis McClelland, Hugh L. Grismer, Nellie Sherrer and her husband, ———— Sherrer, Mrs. E. H. Johnson, Edna Moehlman, Paul Moehlman, R. L. Murray, Rebecca Orr, Harry Orr, Guy Murray, Samuel P. Gray, Jessie Gray Wiley, Charles Wiley, Mrs. Eugenia Gray Witt, Ibbie Helton, Luna Helton Layson, Bert Layson, William Gray, Joe D. McClelland, Samuel McClelland, Harriett Hooker, Ellen Parmento and her husband, ———— Parmento, Mina Rymal, Gallia A. Jones, N. Harriett Pearl, Nuter W. Murphy, William Clinton, George Clinton, C. E. Clinton, Frank Clinton, Eva Hollingsworth, Felix Hollingsworth, Harriett Swackhammer, Otis Clinton, Montervill Clinton, Inez Clinton, Ethel Clinton, Francis J. Zink, Ethel Quillen, W. M. Quillen, Harland S. Huston, Susie Clapp, C. C. Clapp, Lula Huston, Samuel L. Huston, John Huston, Nettie Benbow, W. C. Benbow, William Brinkerhoff, Grover C. Konkler, W. C. Konkler, Charles W. Cline, Sam B. Cline, E. F. Montgomery, David Montgomery, Charles

Cline, George V. Cline, John M. Cline, Ollie Bennett, W. I. Bennett, Catherine Bennett, Samuel Bennett, Elizabeth Zimmerly, Sam E. Zimmerly, Rachel A. Kime, John O. Kime, Alvah H. Cline, Fred Cline, William Cline, Alice Brinkerhoff, H. H. Brinkerhoff, Etta May Perisho, W. H. Perisho, Jr., George D. Murphy, Versa Murphy, Delbert Murphy, Mollie Goodman, Bert Goodman, Josie Goodman Collins, Maude Vermillion, Arthur Vermillion, Nell Goodman, Charles Goodman, Minnie Raymond and her husband ———— Raymond, Fred Goodman, Samuel E. Goodman, Grace O'Bryant and her husband, ———— O'Bryant, William Goodman, Perry Brown, Rebecca Braymer, Edward Braymer, Cora Brown, Mamie Brown, Jennie Brown, John A. Bryant, Frank B. Bryant, Elizabeth Bryant Hall, J. L. Bryant, C. A. Lowry, Clyde B. Lowry, Elgie L. Fisher, Mossie Lowry, Margaret Baird, Mrs. A. G. Murray, A. G. Murray, Josie Alexander, J. W. Alexander, Kate Goodman, Fred Goodman, William Goodman, Charles Goodman, R. E. Goodman, Oscar F. Goodman, and the unknown heirs of Peter McClelland, deceased, and the unknown heirs of Margaret Jane (McClelland) Gray, Sarah (Gray) McFall, Margaret Jane (Gray) Murray, Ann (McClelland) Gray, Thomas Gray, Jr., Peter Frank McClelland, Harriett McClelland Jones, Elizabeth McClelland Rymal, Sallie Clinton, William Clinton, Hugh Clinton, Jacob Clinton, Charles Huston, Andrew Cline, Charles Murphy, James A. Goodman, Richard Goodman, John Goodman, Margaret Brown, Mary Goodman Bryant, Frank Bryant, John A. Bryant, Alfred Bryant, and Emma Bryant Lowry, deceased, have been interpleaded by the plaintiff, and ordered by the court to be made parties to said suit, and required to appear therein and set up and assert their claim, if any they have, to the property, money and other thing of value, whatsoever, belonging to the estate of the said Peter McClelland, deceased, now in the hands of said John K. Rose, trustee, either as heirs at law of said Peter McClel-

land, deceased, or as legatees under the last will and testament of said Peter McClelland, deceased, or heirs and legal representatives of such heirs of Peter McClelland, deceased, or legatees under his said will, or otherwise; the nature of plaintiff's cause of action as alleged in said petition being to enjoin the defendants, W. H. Hoffman, Robert H. Rogers, D. A. Kelley, Anna G. Herring, executrix, Laura Beall Bagby, W. H. Bagby and S. S. Fleming, sheriff, from selling the hereinafter described real estate under an order of sale issued out of the 54th District Court of McLennan County, Texas, in cause No. 6258, and styled W. H. Hoffman et al vs. Peter McClelland, Jr., and levied by said S. S. Fleming, Sheriff, on said property on the 9th day of May, 1916, and advertised by said Sheriff to be sold on the first Tuesday in June, 1916, at public vendue as the property of Peter McClelland, Jr., which property constitutes a part of said trust estate of Peter McClelland, deceased, now in the possession of said John K. Rose, Trustee, who had theretofore been appointed such trustee of said Peter McClelland estate by the 19th District Court of McLennan County, and to construe the last will and testament of Peter McClelland, deceased, to determine whether under the terms of said will Peter McClelland, Jr., had any interest in said property subject to sale under execution, or whether by the terms thereof same passed to and became the property of the collateral heirs of Peter McClelland, deceased, who are designated in said will as "my heirs at law," whose names, as far as known, are above set forth and made parties hereto, and the unknown heirs of the parties above named herein, and praying that said Peter McClelland, Jr., and his vendees, the said F. M. Etheridge and J. M. McCormick, on the one side, and the said other parties named herein as coming within the designation of the term used in said will as "my heirs at law," and their heirs and legal representatives be cited to appear and required to set up and assert therein whatever claim, if any, they and each of them may have

under said will to said property, which is described as follows:

Lots Nos. 1, 2, 3 and 4, in Block 6, in the City of Waco, McLennan County, Texas, located at the south corner of Fourth and Austin streets.

And to further determine who, according to the terms of said will, are the owners of the remainder in fee of all the properties of said estate after the termination of said trust, and to whom plaintiff as such trustee, or his successors in trust, shall deliver the same at the expiration thereof.

Herein fail not, but have you before said court on the said first day of the next term thereof this writ, with your return thereon, showing how you have executed the same.

Witness R. V. McClain, Clerk of the District Court of McLennan County.

Given under my hand and seal of said court in the City of Waco, this the 19th day of October, A. D. 1916.

(Seal) R. V. McCLAIN,

Clerk of the District Court of McLennan County, Texas.

By Mary Goldberg, Deputy.

Issued this the 19th day of October, A. D. 1916.

R. V. McCLAIN,

Clerk of the District Court of McLennan County, Texas.

By Mary Goldberg, Deputy.

10-28; 11-4-11-18-25; 12-2-9-16

(Endorsed as follows, to-wit): No. 8 in Equity. Peter McClelland, Jr., Plaintiff, vs. John K. Rose, Trustee, Et. Al., Defendants. Plaintiff's Supplemental Bill. Filed 13 day of November, 1916. D. H. Hart, Clerk. By J. B. Gean, Deputy.

Filed 14 day of Feb., 1918. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy.

PETER McCLELLAND, JUNIOR, *Plaintiff,*

vs. No. 8 in Equity

JOHN K. ROSE Et Al., *Defendants.*

On this the 26th day of February A. D. 1918, came regularly on to be heard the above entitled and numbered cause, and thereupon came on to be heard the motion to dismiss plaintiff's supplemental bill, said motion being filed herein February 26, 1917, and also the motion filed herein on March 10, 1917 to strike paragraphs 6a, 6b and 6c of the plaintiff's amendment to his supplemental bill herein, said motions having been filed herein by the following named defendants, to-wit: S. L. Houston, William Cline, Alva H. Cline, Fred Cline, Alice Brinkerhoff, Etta May Perisho, W. H. Perisho, Jr., George D. Murphy, Charles Cline, Sam B. Cline, Chas. W. Cline, John M. Cline, Ollie Bennett, W. I. Bennett, Catherine Bennett, Samuel Bennett, Elizabeth Zimmerly, Sam F. Zimmerly, Rachael A. Kime, John C. Kime William Brinkerhoff, Ethel Quillen, Harlan S. Houston, Susie Clapp, C. C. Clapp, Lula Houston, Nuter W. Murphy, C. E. Clinton, Frank Clinton, Eva Hollingsworth, Felix Hollingsworth, Samuel P. Gray, William L. Gray, Lugenia Witt, N. Harriett Pearl, Nettie Benbow, W. C. Benbow, Grover C. Konkler, W. C. Konkler, Josephine Alexander, J. W. Alexander, Kate Goodman, Fred Goodman, Charles Goodman, Oscar F. Goodman and Margaret Baird, and the court having heard and considered said motions, and being duly advised in the premises, is of the opinion that the law thereon is with the plaintiff, and said motions should be and the same are hereby overruled, and thereupon said defendants declined to make further answer herein; and thereupon the following named defendants, to-wit: Eugenia Witt, Henrietta Goodson and Itys M. Goodson, her husband, James William McFall, Walker Fountain McFall, Lona Dodge wife of Robert W. Dodge, Stella

Arey wife of George C. Arey, Nora Armstrong wife of Thomas J. Armstrong, Mollie B. Davis wife of Fred H. Davis, Robert L. Murray, Kate M. Johnston wife of E. H. Johnston, Rebecca J. Orr, wife of Harry Orr, Cora Bowers wife of James C. Bowers, John Guy Murray, Edna Moehlmann wife of Paul Moehlmann, Otho Donald Gray Murray, Joseph D. McClelland, William Samuel McClelland, Harriett Hooker wife of Samuel Hooker, Ellen Parmenter wife of William Parmenter, Mina Rymal, Emma F. Montgomery wife of David J. Montgomery, Mollie Goodman, George Albert Goodman, Josephine (Goodman) Collins, Maud (Goodman) Vermillion, wife of Arthur Vermillion, Fred Goodman, Minnie (Goodman) Sampson, wife of Ray Sampson, Nellie Goodmand and Charles Goodmand having heretofore appeared herein, failed to make further answer herein; and it further appearing to the court that due and legal service, by publication, had been made in all respects in accordance with law, commanding the following named defendants, and their heirs and legal representatives, to appear, plead, answer or demur to the supplemental bill filed herein by the plaintiff by the 26th day of February A. D. 1917, in default of which this court, as said defendants were duly admonished, would proceed to the hearing and adjudication of this suit, to-wit: The unknown heirs of Peter McClelland, Senior, deceased, of Margaret Jane (McClelland) Gray, of Sarah (Gray) McFall, of Margaret Jane (Gray) Murray, of Ann (McClelland) Gray, of Thomas Gray, Jr., of Peter Frank McClelland, of Harriett McClelland Jones, of Elizabeth McClelland Rymal, of Sallie Clinton, of William Clinton, of Hugh Clinton, of Jacob Clinton, of Charles Huston, of Andrew Cline, of Charles Murphy, of James A. Goodman, of William Goodman, of Richard Goodman, of John Goodman, of Margaret Brown, of Mary Goodman Bryant, of Frank Bryant, of John A. Bryant, of Alfred Bryant and of Emma Bryant Lowry, and their heirs and legal representatives, and each and every of said defend-

ants, though duly and legally cited to appear and answer herein, wholly failed to appear and answer herein; except through those other defendants who represent them under the practices of courts of equity.

And it further appeared to the court that the following named defendants, to-wit: John A. Bryant, Frank B. Bryant, Mamie Brown, Jennie Brown, Monterville Clinton, Inez Clinton, George Clinton, George V. Cline, William Clinton, Ethel Clinton, Otis Clinton, Elgie L. Fisher, Bert Goodman, Mrs. Elizabeth Bryant Hall, Gallia A. Jones, Albert G. Jones, Clyde B. Lowry, Mossie Lowry, Lula Helton Layson and her husband Bert Layson, Mrs. A. G. Murray and her husband A. G. Murray, Dan Murray, W. F. McFall, Harriet Swackhammer, Jessie Gray Wiley and her husband Charles Wiley, Francis Zink and Mrs. Andrew Zink had each of them been duly, legally and personally served to appear and answer herein, and that each and every of them failed to appear and answer herein; except through those other defendants who represent them under the practices of the courts of equity;

And in appearing that each and every of the following named defendants, to-wit: Josephine Alexander and her husband, J. W. Alexander, Stellar Arey and her husband, George Arey, Nora Armstrong and her husband Thomas Armstrong, Mrs. May C. Babcock, Ollie Bennett and her husband, W. I. Bennett, Katherine Bennett and her husband, Samuel Bennett, William Brinkerhoff, Alice M. Brinkerhoff and her husband, H. H. Brinkerhoff, Nettie Benbow and her husband, W. C. Benbow, Mamie Brown, Jennie Brown, Cora Brown, Rebecca Braymer and her husband Edward Braymer, Cora Bowers and her husband, James C. Bowers, John A. Bryant, Frank B. Bryant, J. L. Bryant, surviving wife of Alfred Bryant, Perry Brown, Susie Clapp and her husband, C. C. Clapp, Charles W. Cline, Sam B. Cline, Charles Cline, George V. Cline, John M. Cline, Wil-

liam Cline, Alvah H. Cline, Montervill Clinton, Inez Clinton, Ethel Clinton, Otis Clinton, William Clinton, George Clinton, C. E. Clinton, Frank Clinton, Josie Goodman Collins, Leona Dodge and her husband, Robert W. Dodge, Mollie Davis and her husband, Fred H. Davis, Elgie L. Fisher, Charles Goodman, Mollie Goodman, Bert Goodman, Nell Goodman, Henrietta McFall Goodson and her husband, Itys Goodson, Fred Goodman, Kate Goodman, Charles Goodman, R. E. Goodman, William L. Gray, Thomas Gray, Samuel P. Gray, Elizabeth Bryant Hall, Ibbie Helton, Eva Hollingsworth and her husband, Felix Hollingsworth, Harriett Hooker, Lula Huston surviving wife of Charles H. Huston, Samuel L. Huston, Harlan S. Huston, Mrs. E. H. Johnson, Gallia A. Jones, Albert G. Jones, Rachael A. Kime and her husband, John O. Kime, Grover C. Konkler, W. C. Konkler, Luna Helton Layson and her husband, Bert Layson, C. A. Lowry, Mossie Lowry, Clyde B. Lowry, Joe W. McClelland, Samuel McClelland, W. F. McFall, Walker McFall, Mrs. E. F. Montgomery and her husband, David M. Montgomery, Versa Murphy, Delbert Murphy, Netta W. Murphy, George D. Murphy, Dan Murray, Edna Moehlman and her husband, Paul Moehlman, R. L. Murray, Guy Murray, Mrs. A. G. Murray, and her husband, A. G. Murray, Rebecca Orr and her husband, Harry Orr, Grace O'Bryant and her husband, ——— O'Bryant, Ellen Parmento and her husband ——— Parmento, N. Harriett Pearl, Etta M. Perisho and her husband, W. H. Perisho, Jr., Ethel Quillen and her husband, W. M. Quillen, Minnie Raymond and her husband, ——— Raymond, Mina Tymal, Mary Stone, Nellie Sherrer and her husband, ——— Sherrer, Harriett Swackhammer, Maude Vermillion and her husband, Arthur Vermillion, Jessie Gray Wiley and her husband, Charles Wiley, Eugenia Witt, Elizabeth Zimmerly and her husband, Sam E. Zimmerly, Mrs. Andrew Zink and Francis Zink, the unknown heirs of Peter McClelland, Senior, deceased, and of Mar-

garet Jane (McClelland) Gray, of Sarah (Gray) McFall, of Margaret Jane (Gray) Murray, of Ann (McClelland) Gray, of Thomas Gray, Jr., of Peter Frank McClelland, of Harriett McClelland Jones, of Alizabeth McClelland Rymal, of Sallie Clinton, of William Clinton, of Hugh Clinton, of Jacob Clinton, of Charles Huston, of Andrew Cline, of Charles Murphy, of James A. Goodman, of William Goodman, of Richard Goodman, of John Goodman, of Margaret Brown, of Mary Goodman Bryant, of Frank Bryant, of John A. Bryant, of Alfred Bryant and of Emma Bryant Lowry, and their heirs and legal representatives, are members of the class designated by the deceased, Peter McClelland, Senior, in his last will and testament as "my heirs at law"; and, by appropriate representation, were each and every of them parties to, and were and are bound and finally and forever concluded by the final decree of this court construing the said last will and testament of the said Peter McClelland, Senior, rendered herein February 27, A. D. 1914;

And it appearing to the court that the allegations of the plaintiff's supplemental bill herein filed on November 13, 1916, and the amendment thereto filed herein on March 5, 1917, are true;

It is, therefore, ordered, adjudged and decreed by the court, that the original decree herein rendered on February 27, A. D. 1914, be and the same is hereby construed and interpreted so as that the same did extend to and embrace, and the same is hereby decreed to extend to, embrace and include, each and every of the said defendants hereinabove named, and each and every member of the class designated by the said Peter McClelland, Senior, in his last will and testament as "my heirs at law" and his or her heirs and legal representatives, whether specifically named therein or herein or not, and it is further ordered, adjudged and decreed by the court that each and every of the defendants

hereinabove named, as well as the defendants specially named in the said original final decree herein rendered on February 27, 1914, be and they are hereby finally and perpetually concluded by said original decree, the same as if the name of each and every of said defendants had been specifically set forth in said original decree; and

It is further ordered, adjudged and decreed by the court that, as against each and every of said defendants, and as against every member of the class designated by the said testator as "my heirs at law" as aforesaid, and as against each and every collateral heir of the said testator, and his or her heirs and legal representatives, whether known or unknown, and whether specifically named herein or not, the said plaintiff, Peter McClelland, Junior, is, subject to the trust created by the will and the codicil set forth in paragraph 2 of the plaintiff's original bill herein, which trust is construed as hereinafter set forth, the owner in fee of all and singular the properties and estate of the said deceased Peter McClelland, Senior, which property and estate, among other things, comprises the following described real property, situate in the City of Waco, in the County of McLennan, in the Western District of the State of Texas, to-wit: Lots six (6) and seven (7), in block four (4), according to the original town plat of the City of Waco, beginning at the northeast corner of Austin and Fourth streets, and running thence N45E along the north line of Austin Street one hundred (100) feet, thence N45W one hundred sixty-five (165) feet to south line of an alley which runs east and west through said block, thence S45W with the south line of said alley one hundred (100) feet to the east line of Fourth Street; thence S45E along the east line of Fourth Street one hundred sixty-five (165) feet to the place of beginning. Seventy-five (75) by two hundred and forty (240) feet, a part of lots eight (8), nine (9), ten (10), eleven (11) and twelve (12), in block four (4), according to the orig-

inal town plat of the City of Waco, fronting seventy-five (75) feet on east side of Fourth Street by two hundred forty (240) feet on north side of alley which runs east and west through said block, beginning at the intersection of the east line of Fourth Street and north line of said alley, thence N45W feet along the east line of Fourth Street, thence N45E parallel with said alley two hundred forty (240) feet, thence S45E parallel with Fourth Street seventy-five (75) feet to said alley, thence S45W with the north line of said alley two hundred forty feet (240) to the place of beginning, said parcel of land being further designated upon the official tax map of the City of Waco as lot H in block four (4) as shown on page one (1) of said map. Lots one (1), two (2), three (3) and four (4), in block six (6), according to the original town plat of the City of Waco, beginning at the southeast corner of Austin and Fourth Streets, and running thence S45W along the south line of Austin Street two hundred (200) feet to the north line of an alley which runs east and west through said block, thence N45E two hundred (200) feet along the north line of said alley to the west line of Fourth Street, thence N45W with the west line of Fourth Street to the place of beginning. Lots ten (10) and eleven (11) in block seven (7), according to the original town plat of the City of Waco, fronting on Franklin Street, beginning in the north line of Franklin Street at a point one hundred (100) feet N45E from the east of South Fourth Street and running thence N45E one hundred (100) feet, thence N45W one hundred sixty-five (165) feet to the south line of alley which runs east and west through said block, thence S45W along the south line of said alley one hundred (100) feet to a point N45E one hundred (100) feet from east line of said Fourth Street, thence S45E one hundred sixty-five (165) feet to place of beginning. A part of Farm Lot forty-six (46), according to the original town plat of the City of Waco, being the whole of said Farm lot fronting on North Fifteenth Street,

lying between Jefferson and Barnard Streets, by a depth of two hundred fifty (250) feet, beginning at the original northeast corner of said Farm Lot, in the west line of Fifteenth Street, thence S45E with the west line of Fifteenth Street one hundred sixty (160) feet, more or less, to the north line of Barnard Street, thence S45W with the north line of Barnard Street two hundred fifty (250) feet, thence N45W one hundred sixty (160) feet, more or less, to the north line of said Farm Lot, in the south line of what is called Jefferson Street, thence N45E with the north line of said Farm Lot two hundred fifty (250) feet to the place of beginning, said tract of land being designated upon the official tax map of the City of Waco, at page thirty-four (34), as Lot three (3), Block L; and also the following described real property situated in said McLennan County, and more particularly described as follows, to-wit: All that certain tract or parcel of land situate, lying and being in the County of McLennan, Texas, containing 477.5 acres of land, a part of sections 1 and 2, range 7, and a part of range 8, section 2, of the subdivision of the Thos. De La Vega II League Grant: Beginning at a stake in the S. W. corner of section 2, range 7, where an elm 12 in. in dia. bears N. 35½ W. 2-½ vrs. (marked 2) and the stump of original bearing tree an elm bears S. 25-½ E. 6-½ vrs. and an elm marked X bears N. 9 W. 15 vrs; Thence N. 62-½ E. with S. line of section 2, 62[illegible] rs. to center of Tradinghouse Creek; thence up said creek with its meanders of center of same to point 385 vrs. to right angles with E. line of Section 1 which is S. W. corner of a 350 acre tract; Thence N. 28 W. 229 vrs. parallel with E. line of said section 1 and 2 crossing division line of said section at about 790 vrs. to center of Tiger Branch, Thence down Tiger Branch with its meanders of center to where same empties into Old Run; Thence up Old Run with its meanders where same empties into Tehucana Creek; Thence down Tehucana Creek with center of same to mouth of Trading

House Creek; Thence up Trading House Creek with center of same to where it crosses line between ranges 7 and 8, also E. line of section 2, range 8; Thence S. 28 E. 195 vrs. to the place of beginning; and being the same property described in Volume 208, page 438, and also volume 199, page 624, deed records of McLennan County, Texas, which deed records are here referred to and made a part hereof for further description of the land herein conveyed; and also being the same property conveyed by T. J. Primm to Robert Orum by deed recorded in book 249, page 184, deed records of McLennan County, Texas, and also being the same property conveyed by Robert S. Orum and Ruth B. Orum to John K. Rose, Trustee of the Estate of Peter McClelland, by deed of date December 10, 1914, and duly recorded in Record Book 271, page 565, of the Deed Records of said McLennan County, to which deed and the record thereof reference is hereby made for further description; also all personal property of every kind and character whatsoever, and wheresoever situate, belonging to the said Peter McClelland, Senior, now in or hereafter to come into the hands of John K. Rose as Trustee, and

It is further ordered, adjudged and decreed by the court, that the executory limitation over to the heirs at law, as created and provided for by item eight (8) of the said last will and testament of the said Peter McClelland, Senior, has become and is wholly extinguished; and that no executory devisee included, embraced in, or referred to therein or thereunder, or embraced in the class designated by the said testator as "my heirs at law" has any interest whatsoever in or to, or claim upon, or any right whatsoever to the said estate of the said Peter McClelland, Senior, either in whole or in part; and,

It is further ordered, adjudged and decreed by the court, that all and singular the properties of whatsoever character, and wheresoever situate, belonging to the said estate of the

said Peter McClelland, Senior, be and the same are hereby, subject to the trust aforesaid, vested in the plaintiff Peter McClelland, Junior.

It is further ordered, adjudged and decreed by the court, that all the right, title and interest of whatsoever character of each and every of said defendants, and of each and every member of the said class designated by the said testator as "my heirs at law," his or her heirs and legal representatives, be and the same is hereby divested out of each, every and all of them and the same is hereby vested in the said Peter McClelland, Junior.

It is further ordered, adjudged and decreed by the court, that all character of claim whatsoever of each and every of the said defendants, and each and every of the collateral heirs of the said testator, and each and every member of the class designated by the said testator in his aforesaid last will and testament as "my heirs at law", including their heirs and legal representatives, into, upon or against the said estate of the said Peter McClelland, Senior, deceased, or any part thereof, be and the same is hereby forever extinguished, and the cloud cast upon the title of the said plaintiff, Peter McClelland, Junior, to the said estate, by the adverse claim of each and every of the said defendants, including every collateral heir of the said testator, which includes every member of the said class designated by the said testator as "my heirs at law" and his or her descendant or descendants, is hereby forever removed, and the said plaintiff, Peter McClelland, Junior, is hereby subject to the trust aforesaid, forever quieted in his title and peace to all and singular the properties of the said Peter McClelland, Senior, deceased; and,

It is further ordered, adjudged and decreed by the court that the injunction heretofore issued herein on, to-wit, December 19, 1916, be and the same is hereby in all things perpetuated; and,

It is further ordered, adjudged and decreed by the court, that each and every of the said defendants herein, whether designated by name, as collateral heirs of the said testator, or as members of the said class designated by the said testator as "my heirs at law" or not, are hereby forever and perpetually enjoined from instituting or maintaining, in any court whatsoever, any suit, action or other proceeding having for its object or purpose the challenging, in any respect whatever, either the validity or effect of said original final decree herein heretofore rendered on February 27, 1914, or of this decree; and jurisdiction of this cause is hereby retained for the purpose of enabling this court to enforce this injunctive provision; and,

It appearing to the court that the said will of the said testator creates a valid and active trust for and during the natural lifetime of the said plaintiff, Peter McClelland, Junior, and that John K. Rose is the duly appointed, qualified and acting substitute trustee under said will; and it further appearing to the court that by the terms of the codicil appended by the said testator to his aforesaid last will and testament, it is distinctly provided that, if in the judgment of the trustee the said plaintiff, Peter McClelland, Junior, should be, or become, provident and careful, the trustee may make to him such advances out of the estate as he may think right and proper; and it further appearing to the court that the said estate of the said testator consists for the most part of revenue bearing real estate;

It is further ordered, adjudged and decreed by the court, that the said John K. Rose, as substitute trustee as aforesaid, may, without further order of this court, make from time to time such advances to the said plaintiff, Peter McClelland, Junior, not to exceed the net rent revenues and income from the said estate, as he may think right and proper; but no portion of the corpus of the said estate shall be delivered to, or be surrendered over during the lifetime

of the plaintiff to the said plaintiff, or to his vendees, except upon the further order of this court; and this court hereby retains jurisdiction of this cause to the end that it may, from time to time as occasion may require, exercise its power of direction and control over said trustee in this respect; and,

It is further ordered, adjudged and decreed by the court that jurisdiction of this cause be and the same is hereby retained for the purpose of the accounting specified and provided for in the said original final decree herein rendered on February 27, 1914; and,

It is further ordered, adjudged and decreed by the court that the said plaintiff, Peter McClelland, Junior. do have and recover off and from John K. Rose as Trustee, as aforesaid, all and singular, all costs by all parties hereto, expended in this suit; and the said John K. Rose, Trustee, is hereby directed to make payment thereof.

Done at Waco, Texas, this the 4th day of March, A. D. 1918, but as of the 26th day of February, A. D. 1918.

DUVAL WEST

Judge of the District Court of the United States for the Western District of Texas.

O. K.

F. M. ETHERIDGE

O. L. STRIBLING

MARSHALL SURRATT

(Endorsed as follows, to-wit): No. 8 in Equity. Peter McClelland, Junior, Plaintiff, vs. John K. Rose Et Al, Defendants. Decree. Filed March 4, 1918. D. H. Hart, Clerk. By W. D. Rondthaler, Deputy. Entered Equity Journal, Vol. B, p. 104, Et. Seq.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

vs. No. 8 in Equity

JOHN K. ROSE, Et Al, *Defendants.*

W. H. HOFFMAN, Et Al, *Intervenors.*

To the Honorable Judge of Said Court:

Your petitioners, W. H. Hoffman, D. A. Kelley, Robert H. Rogers, and Anna G. Herring, individually and as administratrix of the estate of W. D. Herring, deceased, and Independent executrix of his last will and testament, all of McLennan County, Texas, and Laura Belle Bagby, joined herein by her husband, W. H. Bagby, of the County of Los Angeles, State of California, ask leave of the Court to file their petition for intervention herein, and that notice of the invention (intervention) be given to John K. Rose, trustee, of the County of McLennan, State of Texas, and F. M. Etheridge and J. M. McCormick, both of the County of Dallas, City of Dallas, State of Texas, and to Peter McClelland Jr., by notice to said F. M. Etheridge and J. M. McCormick, his attorneys of record in accordance with Equity Rule No. 4.

D. A. KELLEY,
ALBERT BOGGESS
ROBT. H. ROGERS
M. C. H. PARK
Attorneys for Intervenors.

(Endorsed as follows, to-wit:) No. 8 Equity. Peter McClelland, Jr., vs. John K. Rose, et al. Motion for Leave to File Intervention. Lodged in Clerk's Office on March 9, 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

PETER McCLELLAND, JR., *Plaintiff*,
vs. No. 8 in Equity
JOHN K. ROSE, Et Al, *Defendants*.
W. H. HOFFMAN, Et Al, *Intervenors*.

To the Honorable Judge of Said Court:

Your petitioners, W. H. Hoffman, D. A. Kelley, Robert H. Rogers and Anna G. Herring, individually and as administratrix of the estate of W. D. Herring, deceased, and Independent executrix of his last will and testament, all of McLennan County, Texas, and Laura Belle Bagby, joined herein by her husband W. H. Bagby, of the County of Los Angeles, State of California, with leave of the court file this, their petition of intervention herein, and, complaining of Peter McClelland, Jr., who is plaintiff herein, respectfully represent and show to the court:

I.

That these intervenors heretofore, towit, on or about the 24th day of May, 1915, in the District Court of McLennan County, Texas, for the 54th Judicial District, in cause No. 6258, entitled W. H. Hoffman, et al, vs. Peter McClelland, Jr., recovered a judgment against said Peter McClelland, Jr., for the sum of Seven thousand five hundred and sixty-seven dollars and fifty-four cents ($7,567.54) together with interest thereon from said May 24th, 1915, at the rate of six per cent per annum, and all costs of said suit, and for the foreclosure of a valid attachment lien on lots 1, 2, 3, and 4 in block 6 in the City of Waco, McLennan County, Texas, which property is located at the South corner of the intersection of Fourth and Austin Streets in said

City of Waco, and which lots had been levied on and attached by these intervenors as the property of said Peter McClelland, Jr.

II.

That from said judgment no appeal has ever been taken, or writ of error sued out, and that the same, said judgment, is in full force and effect, and nothing has ever been paid thereon.

III.

That on or about the 9th day of May, 1916, these intervenors, as plaintiffs in said judgment, caused an order of sale of said lots to be issued on said judgment and placed in the hands of the sheriff of said McLennan County, Texas, for execution; and that said sheriff, viz: S. S. Fleming, in obedience to said order of sale, advertised said lots to be sold on the first Tuesday in June 1916, as the law directs. But that no sale of said lots was made under said writ (order of sale) or has ever been made, because John K. Rose, Trustee, who is defendant in this cause, on or about the 31st day of May 1916, in said District Court of McLennan County, Texas, (for the 54th Judicial District) sued out an injunction restraining said sheriff and these intervenors from making such sale. Said injunction being granted in cause No. 6480, in said District Court of McLennan County, Texas, (for the 54th Judicial District) entitled John K. Rose, Trustee, vs. W. H. Hoffman, et al, and which injunction, upon the trial of said cause No. 6480, in said District Court of McLennan County, Texas, was by said court, on or about the 23rd day of October, 1918, made perpetual because of the said court's holding and conclusion of law that the property in controversy, to wit, the lots above described, was "a part of what is known as a spendthrift trust now being administered by John K. Rose pursuant to the provisions of the will of Peter McClelland, Sr., deceased, and that Peter

McClelland, Jr., has no interest in said property which can be seized and sold for the payment of his debts, and that John K. Rose, Trustee, has authority to protect the trust estate which he is administering as well as the remainder interest of Peter McClelland, Jr., from being sold for the payment of his debts, notwithstanding the fact that the contemplated sale of the remainder estate which the defendants "(meaning these intervenors)" propose to make would not interfere, and would not be allowed to interfere, with the possession of John K. Rose, or with the administration of the trust that he is carrying out, during the lifetime of Peter McClelland, Jr."

IV.

That said judgment of said District Court perpetuating said injunction, was, on appeal perfected therefrom, affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, on or about the 3rd day of December 1919, as is fully reported in Vol. 217, pages 424-428, of the Southwestern Reports; and that the Supreme Court of Texas has since said affirmance by said Court of Civil Appeals refused and denied to these intervenors a writ of error to review and correct said judgment of said Court of Civil Appeals.

V.

So these intervenors allege and show to this court that notwithstanding the finding and holding of said District Court of McLennan County, Texas, (which has been affirmed as aforesaid) that the judgment in favor of these intervenors against said Peter McClelland, Jr., rendered in said cause No. 6258, on to-wit, the 24th day of May 1915, foreclosing an attachment lien on said lots 1, 2, 3, and 4 in block No. 6, in the City of Waco, McLennan County, Texas, and ordering the sale of said property to satisfy said judgment amounting to $7567.54, was valid and binding, and that the

court had jurisdiction to foreclose said attachment lien, yet said State courts, because of their holdings and conclusions first herein above set forth,—in paragraph III—they, said State Courts, deny to these intervenors the enforcement of their said judgment "during the life time of said Peter McClelland, Jr."

VI.

These intervenors plead and admit that said lots 1, 2, 3 and 4, in Block 6, in the City of Waco, McLennan County, Texas, upon which they have a valid foreclosure of a valid lien for a valid and unsatisfied debt against said Peter McClelland, Jr., do constitute a part of what is known, and in these proceedings is called and referred to, as the estate of Peter McClelland, Sr., deceased: and they pray that inasmuch as said lots, as a part of said estate, are now in the possession of said John K. Rose, Trustee, and have been, as a part of said estate, impounded by this court by proceedings in this cause, that they, intervenors, be given, by this court, that protection and relief to which they are, and shall be found to be, entitled in equity. And in this connection intervenors allege and show that said Peter McClelland, Jr., has no property within this state except that which is impounded in this cause, and under the control and subject to the orders of this court including the said lots upon which intervenors have their said lien, and that, as already shown herein, the state courts have denied, and do deny to these intervenors the enforcement of their said judgment and lien "during the life time of said Peter McClelland, Jr." So that these intervenors are without further remedy in said State courts during the life time of said Peter McClelland, Jr., and will probably lose their debt and claim against said Peter McClelland, Jr., unless given aid and protection by this court, and their said claim, debt and judgment against said Peter McClelland, Jr., and their said lien upon said lots be so recognized, established, maintained and preserved

by order and decree of this court that said debt and judgment can and shall be collected, and their said lien enforced at the termination of said trust in said John K. Rose, to-wit, after the death of said Peter McClelland, Jr. So intervenors pray that all parties hereto, adversely interested, viz: said Peter McClelland, Jr., John K. Rose, Trustee, and the attorneys of said Peter McClelland, Jr., to-wit, F. M. Etheridge and J. M. McCormick, to whom said Peter McClelland, Jr., has sold and conveyed an undivided one-third interest in the property constituting the estate of Peter McClelland, Sr., deceased, and who resides in Dallas County, Texas, be given the proper notice of this intervention, and that upon final hearing hereof that these intervenors have their rights as against said Peter McClelland, Jr., and as against said lots, upon which they have a valid foreclosure of a valid lien, protected and maintained by the proper order and decree of this court in the exercise of its equity powers and jurisdiction: that they have judgment against said Peter McClelland, Jr., for their said debt and foreclosure, and be given such other and further relief as this court, in the exercise of its equity powers, may find them to be entitled.

And in view of the fact that this court has held, (in its order and decree herein rendered on the 26th day of February 1918, from which no appeal has been taken, or can be taken,) that said Peter McClelland, Jr., is, subject to the trust created by the will, and codicil thereto, of Peter McClelland, Sr. deceased, as set forth in paragraph 2 of the plaintiff's original bill herein, the owner in fee of all and singular the properties and estate of the said Peter McClelland, Sr., deceased, and that "said plaintiff, Peter McClelland, Jr., is, subject to the trust aforesaid, forever quieted in his title and peace to all and singular the properties of the said Peter McClelland, Sr., deceased", these intervenors specially pray that that part of said property, upon which

they have their said lien, which is not included in or embraced by said trust now being administered and executed by said John K. Rose, Trustee, to-wit, the remainder in said lots now vested in said Peter McClelland, Jr., and over which said John K. Rose, Trustee, has no jurisdiction or control, be held and decreed to be subject to intervenors' said debt and lien, and subject to be sold in satisfaction thereof, but without disturbing or interfering with the possession of said John K. Rose, Trustee, or his successors in said trusteeship, or disturbing or interfering with the administration of the said trust during the life time of said Peter McClelland, Jr., and that intervenors be given such full and complete equitable relief as this court shall find them to be entitled.

In this connection the intervenors would respectfully suggest that it will not be equitable to compel them to await the collection of their said debt until the termination of said trust, now being executed by said John K. Rose, when such collection and satisfaction of their said debt can, in part at least, be effected and accomplished by a sale of the remainder in said lots now vested in said Peter McClelland, Jr., and such sale can be ordered and made without in any way interfering with the possession of the trustee during the life and continuance of the trust, and without casting any cloud upon the rights, powers, jurisdiction or authority of said trustee, or on the trust estate over which the trustee has any power, right, title or authority. All of which is respectfully submitted to this court.

D. A. KELLEY,
M. C. H. PARK,
ALBERT BOGGESS,
ROBT. H. ROGERS,
Attorneys for Intervenors.

I, Robt. H. Rogers, one of the parties to the within and foregoing petition, do swear that the statements therein made are true.

ROBT. H. ROGERS.

Sworn to and subscribed before me this 9th day of March 1921.

(Seal) ALLAN McDONNELL
Notary Public of McLennan County, Texas.

(Endorsed as follows, to-wit:) No. 8 in Equity. Peter McClelland, Jr., vs. Jno. K. Rose, et al. Petition of Intervention by W. H. Hoffman et al. Lodged in Clerk's Office on March 9, 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

Motion of Intervenor to file this bill is denied this Nov. 19, 1921.
Waco, Texas. DUVAL WEST,
U. S. Dist. Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JR., *Plaintiff,*

vs. No. 8 in Equity

JOHN K. ROSE, Et Al, *Defendants.*

W. H. HOFFMAN, Et Al, *Intervenors.*

Come now Peter McClelland, Jr., John K. Rose, Trustee, F. M. Etheridge and J. M. McCormick, for the sole and only purpose of presenting this pleading and, reserving each to himself all objections to the jurisdiction of this court, say:

I.

There has been no service upon Peter McClelland, Jr., of the purported bill of intervention herein, nor of the purported petition for leave to file the same, nor of the order of this court of March 9, 1921, relative thereto because, this litigation having long since terminated, Etheridge & McCormick ceased to be and are not now, and were not when a copy of said order was mailed to them, attorneys or solicitors for the said Peter McClelland, Jr., and no other service has been had upon the said Peter McClelland, Jr.

II.

Said parties herein named object to leave being granted the alleged intervenors to file their alleged petition of intervention herein upon the following grounds, to wit:

First: Said purported intervention is not an ancillary bill but is an original bill, and this court is without jurisdiction because no federal queston is involved and because the requisite diversity of citizenship does not exist.

Second: Because said purported bill of intervention shows upon its face, taken in connection with the report of the case of Hoffman et al v. Rose, 217 Southwestern Reporter 424 et seq., which is made a part of said purported petition of intervention by reference, that the alleged intervenors have been solemnly and finally adjudicated to have no lien upon any property whatsoever.

Third: Because the purported bill of intervention and the report of the case of Hoffman et al v. Rose, 217 Southwestern Reporter 424, et seq., made a part thereof, affirmatively shows that the purported judgment attempted to be described in paragraph 1 of said purported bill of intervention is totally void in that it was rendered against Peter McClelland, Jr., a citizen of California, wholly upon substituted service, and that said purported judgment was rendered wholly by default, and that the said Peter McClelland, Jr., did not appear, answer or otherwise submit himself to the jurisdiction of the court, and because it affirmatively appears that it has been solemnly and finally adjudicated that the purported attachment proceedings in the case in which said purported judgment was rendered were absolutely void and therefore the purported judgment *in personam* is totally void.

Fourth: The record of the proceedings in this cause shows that the only question litigated and determined was whether, upon the termination of the trust, the estate of Peter McClelland, Sr., would pass, under the last will and testament of Peter McClelland, Sr., to said Peter McClelland, Jr., or to the collateral heirs of said Peter McClelland, Sr., and it manifestly appears that the alleged intervenors herein are not interested in and have no concern with the said question so litigated herein, and it is obvious that the alleged intervenors herein have not and never have had an interest in the litigation that was conducted and that terminated in the orig-

inal suit herein, in which it was by this court finally decreed that Peter McClelland, Jr., subject to a trust, was the owner of the properties disposed of by the will of said Peter McClelland, Sr., and that the collateral heirs of the said Peter McClelland, Sr., had no interest therein.

Fifth: Because it manifestly appears from the record and proceedings in the original cause in this court that this court has not in its custody, control or possession any property or fund whatsoever. Upon the contrary, it distinctly appears that all the properties disposed of by the will of Peter McClelland, Sr., are in the possession, custody and control, not of this court but of John K. Rose, as trustee under the will of Peter McClelland, Sr.

Sixth: Because it is manifest that the purported bill of intervention is not an ancillary, but is an original proceeding, because it calls for the investigation of a new case arising upon new facts and new parties are attempted to be made.

Seventh: Because it is manifest from the record and proceedings of the original cause herein that the litigation has long since been finally closed, and this court has no control of the property that was made the basis of its former decree, and because F. M. Etheridge and J. M. McCormick, whom the alleged intervenors attempt to make parties herein, were not parties to the former suit.

Eighth: No federal question is involved in or attempted to be presented by said alleged intervention, and there is no diversity of citizenship in that Laura Belle Bagby and her husband, W. H. Bagby, alleged intervenors, and Peter McClelland, Jr., are all citizens of the State of California, and the other alleged intervenors, W. H. Hoffman, D. A. Kelley, Robert H. Rogers, Anna G. Herring and F. M. Etheridge and J. M. McCormick, are all citizens of the State of Texas. This court, therefore, has no jurisdiction because the pur-

ported intervention is not ancillary but is original, and no federal question exists, nor does there exist the requisite diversity of citizenship, and this court therefore has not jurisdiction of the matters and things attempted to be presented by the said purported bill of intervention.

Ninth: It is manifest from an inspection of the will of Peter McClelland, Sr., which by reference is made a part of said purported bill of intervention, that none of the property given by the testator thereby to Peter McClelland, Jr., is or ever will be subject to, but at all times remains free from, the debts and liabilities of the said Peter McClelland, Jr.

Wherefore, premises considered, the parties herein named pray that this Honorable Court refuse leave to the alleged intervenors to file their alleged bill of intervention herein, and as, etc.

MARSHALL SURRATT AND
ETHERIDGE, MCCORMICK & BROMBERG,
Solicitors of John K. Rose, Trustee,
Peter McClelland, Jr., F. M. Etheridge
and J. M. McCormick.

(Endorsed as follows, to-wit:) No. 8 in Equity. Peter McClelland, Jr., Plaintiff, v. John K. Rose et al, Defendants. W. H. Hoffman et al, Intervenors. Opposition of John K. Rose et al to Intervenors' Petition for Leave to File their Petition of Intervention herein. Lodged in Clerk's Office on November 2, 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

PETER McCLELLAND, JR., *Plaintiff*,

vs. No. 8 in Equity

JNO. K. ROSE Et Al, Defendants.

Motion for leave to file intervention by W. H. Hoffman, D. A. Kelley, Robt. H. Rogers, Anna G. Herring individually and as administratrix of estate of W. D. Herring, deceased, and Independent Executrix of his last will and testament, Laura Belle Bagby and W. H. Bagby having been presented together with petition for intervention it is ordered that motion and petition be deposited in the Clerk's office and notice of such be given in accordance with Equity Rule No. 4—by mailing certified copies of motion and petition to Jno. K. Rose trustee, F. M. Etheridge, J. M. McCormick and Peter McClelland, Jr., or their attys of record.

Waco, Texas, DuVal West,
Mch. 9, 1921. U. S. Dist. Judge.

(Endorsed as follows, to-wit:) No. 8 Eq. Peter McClelland, Jr., v J. K. Rose, Trustee. Filed 9 day of March, 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

PETER McCLELLAND, JR., *Plaintiff,*

vs. No. 8 in Equity

JOHN K. ROSE Et Al, *Defendants.*

W. H. HOFFMAN, Et Al, *Intervenors.*

On this the 19th day of November, A. D. 1921, came regularly on to be heard the motion of W. H. Hoffman, D. A. Kelley, Robert H. Rogers, Anna G. Herring, individually and as administratrix of the estate of W. D. Herring, deceased, and independent executrix of his last will and testament, and Laura Belle Bagby, joined by her husband, W. H. Bagby, for leave to file their petition of intervention herein, which petition of intervention was, by the order of this court of March 9, 1921, directed to be deposited with the clerk of this court awaiting the further order of this court thereon. And the court, having heard said motion, said proposed petition of intervention and the objections thereto, and being duly advised in the premises, is of the opinion that said proffered petition of intervention is not ancillary but is original, and that as an original bill this court is without jurisdiction to entertain the same because no federal question is presented therein and because the requisite diversity of citizenship does not exist.

It is therefore ordered, adjudged and decreed by the court that said motion to file said proffered plea of intervention be and the same is hereby overruled for the reason and upon the ground hereinabove specified. To which ruling the said

intervenors hereinabove named duly and in open court excepted and gave notice of appeal.

DuVal West,
United States District Judge.

(O.K.—D. A. Kelley)

Ent. Volume B. page 173, Equity Journal.

(Endorsed as follows, to-wit:) No. 8 in Equity. Peter McClelland, Jr., Plaintiff, v. John K. Rose, et al, Defendants. W. H. Hoffman et al, Intervenors. Order overruling Motion of Intervenors for Leave to File Petition of Intervention. Filed 19 day of Nov. 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS AT WACO.

PETER McCLELLAND, Jr., *Plaintiff*,

vs. No. 8 in Equity

JOHN K. ROSE, Trustee, Et Al, *Defendants*.

W. H. HOFFMAN, Et Al, *Intervenors*.

Intervenors complaining of the order and decree herein rendered on the 19th day of November 1921, assign error as follows:

I.

Inasmuch as this court has held and decided, in this cause, that the remainder in the property in question after the termination of the trust in John K. Rose belongs absolutely to Peter McClelland Jr. and it is this remainder which intervenors have levied on, and seek to hold liable for their debt against Peter McClelland, the court erred in failing and refusing to hold that Intervenors have a valid lien on the interest of Peter McClelland Jr, in the property levied on; and that the judgment of the State Court foreclosing said lien is valid and binding. This holding should have been made in protection of this court's own decision and jurisdiction; and especially in view of the fact that it has been held by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in Lindsey (v) Rose, 175 S. W. Rep. 831, 2, (and since the holding by this court that Peter McClelland, Jr., is the absolute and only owner of the remainder in said property after the termination of the trust in John K. Rose,) that said Peter McClelland, Jr., is not the owner of the said remainder in said property, but is excluded by his father's will *"from ever taking"* and that the collateral heirs of said Peter McClelland, Sr., deceased,

will at the death of Peter McClelland, Jr. become the owners of said remainder, as devisees under the will of Peter McClelland, Sr., deceased; and this holding by the State Court is determinedly adhered to notwithstanding the fact that this court has determined and adjudged that all such collateral heirs of Peter McClelland, Sr., deceased, have no interest in or claim or title to the property left by Peter McClelland, Sr., deceased.

II.

The court should have found and held, and erred in not so doing:

(a) That the judgments and decrees heretofore rendered in this cause, and disposed of by the U. S. Circuit Court of Appeals, as shown opinions reported in Vol. 208, page 503, and Vol. 247, page 721, of the Federal Reports, vested in Peter McClelland, Jr., a remainder in fee in the property in question, subject to the trust thereupon created by the will of Peter McClelland, Sr., deceased.

(b) That the judgment in Intervenor's favor against Peter McClelland, Jr., in cause No. 6258, in District Court of McLennan County, Texas, and which was herein pleaded by Intervenors, was valid and binding, and by a court of competent jurisdiction, notwithstanding the holding by the said Court of Civil Appeals that Peter McClelland, Jr., had no title or interest in the property levied on.

III.

The Court erred in holding:

(a) That it is without jurisdiction to entertain the petition of Intervenors herein, and (b) in overruling the motion to file the same, because,

(1) This Court has in this cause, just as far as it was and is possible to do so, impounded the estate in the hands of John K. Rose, Trustee, and;

(2) has by express order and decree retained jurisdiction of this cause for the purpose of superintending the administration of said estate, as well after as before the death of Peter McClelland, Jr., and to give other and different interpretation to said retention of jurisdiction is to invite and encourage the said collateral heirs of Peter McClelland, Sr., deceased, to attempt to take advantage of said above mentioned holdings of the Texas Court of Civil Appeals, after the death of said Peter McClelland, Sr., and to create and cast a cloud upon all the real estate now in possession and charge of John K. Rose, Trustee, and bring about protracted litigation over the same.

D. A. KELLEY,
M. C. H. PARK
ROBT. H. ROGERS
ALBERT BOGGESS
Attorneys for W. H. Hoffman, et al, Intervenors.

(Endorsed as follows, to-wit:) In Dist. Court of the U. S. for Western Dist. of Texas, at Waco. No. 8, Equity. Peter McClelland, Jr., Plaintiff, vs John K. Rose, Trustee, et al, Defendants. W. H. Hoffman, et al, Intervenors. Assignment of Errors by Intervenors. Filed 28 day of Nov., 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AT WACO.

PETER McCLELLAND, JR., *Plaintiff*,

vs. No. 8 in Equity

JOHN K. ROSE, Trustee, Et Al, *Defendants*,

W. H. HOFFMAN, Et Al, *Intervenors*.

To the Hon. DuVal West, District Judge:

The above named Intervenors, feeling aggrieved by the decree entered and rendered herein on the 19th day of November, 1921, do hereby appeal from said decree to the Circuit Court of Appeals for the Fifth Circuit for the reasons set out in the assignment of errors filed herewith, and pray that their appeal be allowed and that citations be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

D. A. KELLEY
M. C. H. PARK
ROBT. H. ROGERS
ALBERT BOGGESS
Attorneys for W. H. Hoffman et al, Intervenors.

Appeal allowed upon giving bond as required by law for the sum of $500.00.
November 30th, 1921.

DUVAL WEST,
District Judge.

Entered Vol. 3, Page 48, Equity Order Book.

(Endorsed as follows, to-wit:) In Dist. Court of the U. S. for the Western Dist. of Texas, at Waco. No. 8, Equity. Peter McClelland, Jr., Plaintiff, vs John K. Rose, Trustee, et al, Defendants. W. H. Hoffman, et al, Intervenors. Petition for Leave to Appeal by Intervenors. Filed November 30, 1921. D. H. Hart, Clerk.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF TEXAS

I, Wm. L. Edmond, do swear that I am worth in my own right, at least the sum of Five Hundred Dollars, after deducting from my property all that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property, which are known to me; that I reside in McLennan County, Texas, and have property in this State liable to execution worth $1000.00 Dollars, or more.

WM. L. EDMOND.

Subscribed and sworn to before me this the 22 day of December, A. D. 1921.

(Seal)

DELIA SADLER,
Notary Public McLennan County, Texas.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF TEXAS.

I, C. C. Shear, do swear that I am worth in my own right, at least the sum of Five Hundred Dollars, after deducting from my property all that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all incumbrances upon my property, which are known to me; that I reside in McLennan County, Texas, and have property in this State liable to execution worth $1000.00 Dollars, or more.

CECIL C. SHEAR.

Subscribed and sworn to before me this the 22 day of December A. D. 1921.

(Seal)

DELIA SADLER,
Notary Public McLennan County, Texas.

Know All Men by These Presents:

That we, W. H. Hoffman, D. A. Kelley, Robt. H. Rogers, Anna G. Herring, individually and as administratrix of the estate of W. D. Herring, deceased, and independent executrix of his last will and testament, and Laura Belle Bagby, joined by her husband, W. H. Bagby, as principals, and Wm. L. Edmond and Cecil C. Shear as sureties, are held and firmly bound unto Peter McClelland, Jr., John K. Rose, Trustee, F. M. Etheridge and J. M. McCormick in the full and just sum of Five Hundred Dollars to be paid to the said Peter McClelland, Jr., John K. Rose, Trustee, F. M. Etheridge and J. M. McCormick, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of December in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at a session of District Court of the United States from the Western District of Texas at Waco, and on to-wit the 19th day of November, 1921, in a suit depending in said Court, between Peter McClelland, Jr., Plaintiff, vs. Jno. K. Rose, Trustee, et al, Defendants, in which suit the above named obligors attempted to intervene and prayed leave to intervene a decree was rendered against the said W. H. Hoffman, D. A. Kelley, Robt. H. Rogers, Anna G. Herring, in her several capacities, and Laura B. Bagby, denying them leave to intervene, and overruling their motion for leave to intervene, and the said W. H. Hoffman, D. A. Kelley, Robt. H. Rogers, Anna G. Herring, individually, and as administratrix and executrix, as aforesaid, and Laura Belle Bagby, joined by her husband W. H. Bagby, having obtained leave to appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse

the said decree in the aforesaid suit, and a citation directed to the said Peter McClelland, Jr., John K. Rose, Trustee, F. M. Etheridge and J. M. McCormick, citing and admonishing them to be and appear before the United States Court of Appeals for the Fifth Circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said W. H. Hoffman, D. A. Kelley, Robt. H. Rogers, Anna G. Herring, as aforesaid, and Laura Belle Bagby, joined by her husband W. H. Bagby, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of:

ANNA G. HERRING, individually and as executrix of the estate of W. D. Herring, deceased, and Independent executrix of his last will.

W. H. HOFFMAN — D. A. KELLEY

ROBT. H. ROGERS — LAURA BELLE BAGBY

W. H. BAGBY, *pro forma*

WM. L. EDMOND, *Surety* — CECIL C. SHEAR, *Surety*

Approved this, the 23rd day of December, 1921.

DUVAL WEST,
United States Judge.

(Endorsed as follows, to-wit:) No. 8 in Equity. W. H. Hoffman, et al, Intervenors, Appellants, vs. Bond. Peter McClelland, Jr., et al, Appellees. Filed Dec. 23rd, 1921. D. H. Hart, Clerk. By Mrs. A. F. Brin, Deputy.

THE UNITED STATES OF AMERICA, FIFTH JUDICIAL DISTRICT.

The President of the United States,

To Peter McClelland, Jr., J. M. McCormick, F. M. Etheridge, and John K. Rose, Trustee, or their attorneys of record, Etheridge, McCormick & Bromberg, of Dallas, and Marshall Surratt, of Waco, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Fifth Circuit Court at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Texas, in the cause wherein W. H. Hoffman, D. A. Kelley, Robert H. Rogers, Anna G. Herring, individually and as administratrix of the estate and executrix of the will of W. D. Herring, deceased, and Laura Belle Bagby, joined by her husband, W. H. Bagby, intervenors, and appellants, and Peter McClelland, Jr., J. M. McCormick, F. M. Etheridge and John K. Rose, Trustee, are appellees, to show cause, if any there be, why the decree and order rendered against the said .....as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 16 day of December in the year of our Lord one thousand nine hundred and twenty-one.

Signed this, the 16th day of December, 1921.

(Seal) DuVal West,

Attest: United States Judge.

D. H. Hart, Clerk.

(Endorsed as follows, to-wit:) No. 8 Equity. W. H. Hoffman, et al, Intervenors, Appellants, vs. Citation. Peter McClelland (Jr.) et al, Appellees. Marshal's Return. Filed December 19, 1921. D. H. Hart, Clerk. Service of this Citation is hereby accepted on behalf of Appellees. Dec. 27th, 1921. Marshall Surratt and Etheridge, McCormick & Bromberg, Solicitors for Appellees.

CLERK'S CERTIFICATE.

THE UNITED STATES OF AMERICA,
Western District of Texas.

I, D. H. Hart, Clerk of the District Court of the United States for the Western District of Texas, do hereby certify that the foregoing 168 pages, contain a true and correct transcript of the proceedings had and orders entered as therein stated in Cause No. 8 in Equity, styled Peter McClelland, Junior, Complainant vs. John K. Rose, et al, Defendants, W. H. Hoffman, et al, Intervenors, as the same appear on file and of record in this office, except that the original Citation on Appeal with acceptance of service thereon is included therein, at page 168, instead of a copy thereof; and I do further certify that the foregoing record embraces only such pleadings, process, order and evidence as are specified in the praecipe filed by the appellants and the praecipe filed by the appellees.

WITNESS my official signature and the seal of said District Court, at office in the City of Waco, Texas, this the 10th day of January, A. D. 1922.

(Seal) D. H. HART, Clerk.

By MRS. A. F. BRIN, Deputy.

That thereafter, the following proceedings were had in said cause the United States Circuit Court of Appeals for the Fifth Circuit, z:

Argument and Submission.

Extract from the Minutes of November 9th, 1922.

[Title omitted.]

On this day this cause was called, and, after argument by Robert . Rogers, Esq., for appellants, and Francis Marion Etheridge, Esq., r appellees, was submitted to the Court.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3827.

[Title omitted.]

peal from the District Court of the United States for the Western District of Texas.

Opinion of the Court.

[Filed November 21st, 1922.]

Robt. H. Rogers, D. A. Kelley and M. C. H. Park, (D. A. Kelley, . C. H. Park and Robt. H. Rogers on the brief), for Appellants. Francis Marion Etheridge and Marshall Surratt, (Marshall Surtt, Etheridge, McCormick & Bromberg, and F. M. Etheridge on the ief), for Appellees.

Before Walker, Bryan, and King, Circuit Judges.

ALKER, *Circuit Judge:*

The appellants sought the leave of the District Court to file a petin or bill of intervention in a cause previously brought therein. e appellees, who were parties to said cause, objected in writing to e granting of such leave on the ground that the court had "no risdiction, because the purported intervention is not ancillary but original, and no federal question exists, nor does there exist the quisite diversity of citizenship, and this court therefore has not risdiction of the matters and things attempted to be presented by e said purported bill of intervention." The motion for leave to and the objection thereto were disposed of by the following ree:

"On this the 19th day of November, A. D. 1921, came regularly to be heard the motion of W. H. Hoffman, D. A. Kelley, Robert Rodgers, Anna G. Herring, individually and as administratrix

of the estate of W. D. Herring, deceased, and independent executrix of his last will and testament, and Laura Belle Bagby, joined by her husband, W. H. Bagby, for leave to file their petition of intervention herein, which petition of intervention was, by the order of this court of March 9, 1921, directed to be deposited with the clerk of this court awaiting the further order of this court thereon. And the court, having heard said motion, said proposed petition of intervention and the objections thereto, and being duly advised in the premises, is of the opinion that said proffered petition of intervention is not ancillary but is original, and that as an original bill this court is without jurisdiction to entertain the same because no federal question is presented therein and because the requisite diversity of citizenship does not exist.

It is therefore ordered, adjudged and decreed by the court that said motion to file said proffered plea of intervention be and the same is hereby overruled for the reason and upon the ground hereinabove specified. To which ruling the said intervenors hereinabove named duly and in open court excepted and gave notice of appeal."

The appeal is from that decree.

Where the jurisdiction of the District Court is put in issue and the case is disposed of by a decision of that issue in favor of the party raising it, the judgment or decree is not subject to be reviewed by this court on appeal or writ of error. Judicial Code, §§128, 238; United States v. Jahn, 155 U. S., 109; Knisely v. Burt, 248 Fed., 493; Great Northern Ry. Co. v. Blaine County, 252 Fed., 548. The above set out decree was none the less one disposing of the case on the sole ground that the court did not have jurisdiction of it by reason of the circumstance that that decree adjudged that the proffered petition of intervention was not ancillary but was original. By that adjudication the court ruled against the claim that there was a ground on which the asserted jurisdiction could be maintained. That ruling was a step towards, and led up to, the conclusion of the court that it was without jurisdiction of the proceeding in question. A ruling which is a mere incident of or involved in the ultimate conclusion that the court is without jurisdiction does not make a decree to that effect reviewable by this court. Nickels v. Pullman Co., 263 Fed., 551.

The failure of the court formally to certify the question of jurisdiction did not have the effect of depriving the appellants of the right to appeal to the Supreme Court or of giving them the right to have the decree reviewed by this court. It is enough to deprive this court of any right to review the decree that the record shows clearly that the only matter tried and decided in the District Court was one of jurisdiction, and that that court's decree was to the effect that it was without jurisdiction. Herndon-Carter Co. v. Norris, 224 U. S., 496.

It appearing that the appeal in this case should have been taken to the Supreme Court of the United States, instead of to this court, in compliance with the Act approved September 14, 1922, it is ordered that said appeal be transferred to the Supreme Court of the United States.

In U. S. Circuit Court of Appeals.

[Title omitted.]

Order Transferring Cause.

Extract from the Minutes of November 21st, 1922.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, it appearing that the appeal in this cause should have been taken to the Supreme Court of the United States, instead of to this Court, in compliance with the Act approved September 14th, 1922, it is now here ordered, adjudged and decreed that the said appeal, be, and the same is hereby, transferred to the Supreme Court of the United States;

It is further ordered, adjudged and decreed that the appellants, W. H. Hoffman, et als., and the sureties on the appeal bond herein, Wm. L. Edmond and Cecil C. Shear, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 169 to 173 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3827, wherein W. H. Hoffman, et al., are appellants, and Peter McClelland, Jr., et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 168 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of January, A. D. 1923. Frank H. Mortimer, Clerk of the United States

Circuit Court of Appeals, Fifth Circuit. [Seal United States Circuit Court of Appeals, Fifth Circuit.]

Endorsed on cover: File No. 29,333. U. S. Circuit Court Appeals, 5th Circuit. Term No. 783. W. H. Hoffman, D. A. Kelley, Robert H. Rogers et al., appellants, vs. Peter McClelland, Jr., J. M. McCormick, F. M. Etheridge et al. (Transferred from the U. S. Circuit Court of Appeals for the 5th Circuit under Act of Sept. 14, 1922.) Filed January 6th, 1923. File No. 29,333.

No. 3827.

In The

United States Circuit Court of Appeals

For The

FIFTH CIRCUIT.

W. H. HOFFMAN, ET AL., Appellants,

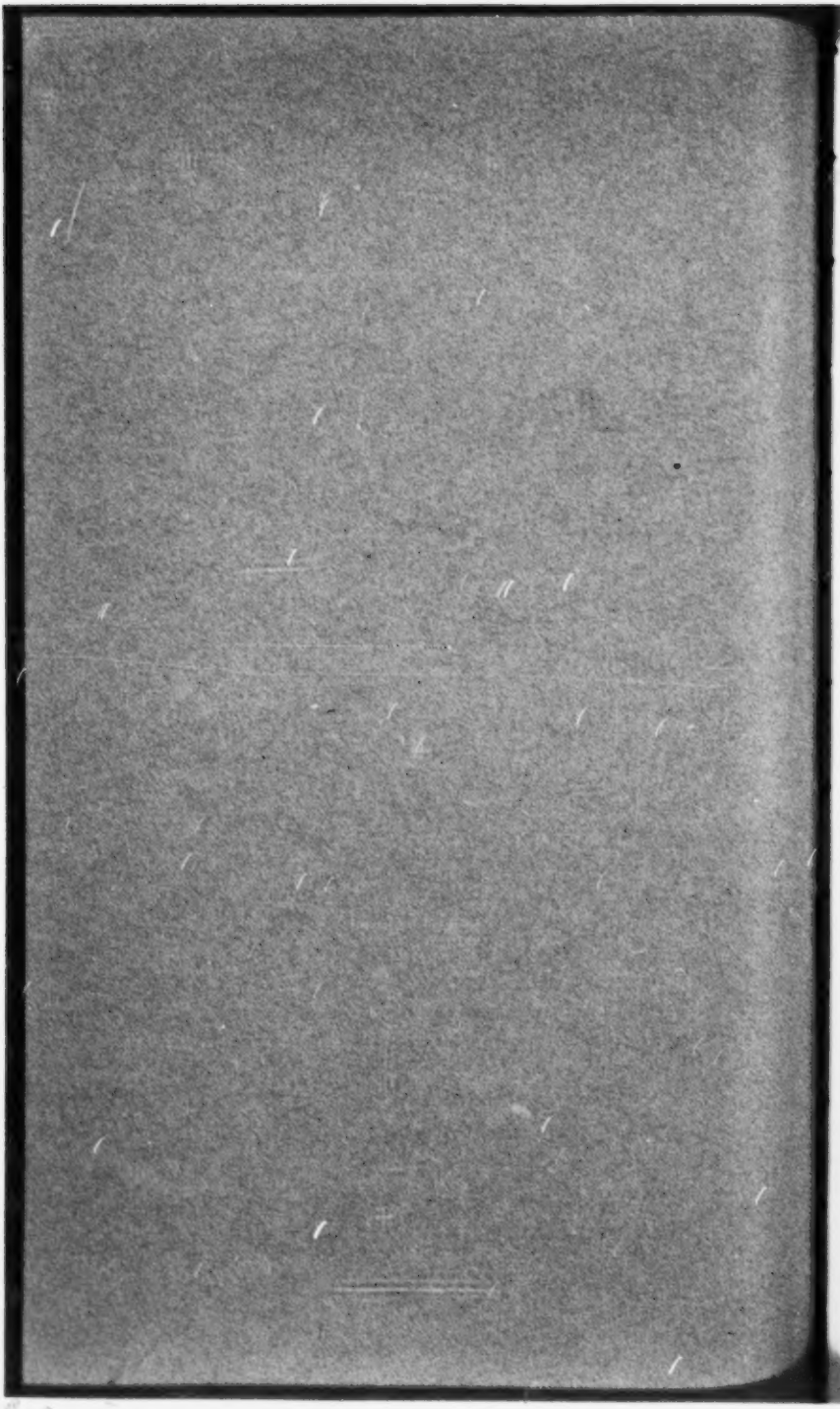
vs.

PETER McCLELLAND, JR., ET AL., Appellees.

APPELLEES' MOTION TO DISMISS THE APPEAL HEREIN FOR WANT OF JURISDICTION.

MARSHALL SURRATT,
ETHERIDGE, McCORMICK & BROMBERG,
Solicitors for Appellees, John K. Rose, Trustee, Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick.

FRANCIS MARION ETHERIDGE,
Counsel.



No. 3827.

In The

United States Circuit Court of Appeals

For The

FIFTH CIRCUIT.

W. H. HOFFMAN, ET AL., Appellants,

vs.

PETER McCLELLAND, JR., ET AL., Appellees.

APPELLEES' MOTION TO DISMISS THE APPEAL HEREIN FOR WANT OF JURISDICTION.

Come now the appellees and move to dismiss the appeal herein because the trial court denied appellants' motion to file their proffered intervention solely on the ground of the want of jurisdiction over the subject matter sought to be put in issue therein and, under Section 238 of the Judicial Code, the appellate jurisdiction of the Supreme Court in this cause is exclusive, and this court has no jurisdiction to entertain this appeal.

STATEMENT.

Appellants asked leave (Record 144) to file their petition of intervention (Record 145 to 151).

Appellees' first exception to appellants' proffered bill of intervention is as follows:

> "Said purported intervention is not an ancillary bill but is an original bill, and this court is without jurisdiction because no federal question is involved and because the requisite diversity of citizenship does not exist." (Record 152).

The pertinent portion of the decree appealed from (Record 157 and 158) reads:

> "And the court, having heard said motion, said proposed petition of intervention and the objections thereto, and being duly advised in the premises, **is of the opinion that said proffered petition of intervention is not ancillary but is original, and that as an original bill this court is without jurisdiction to entertain the same because no federal question is presented therein and because the requisite diversity of citizenship does not exist. It is therefore ordered, adjudged and decreed by the court that said motion to file said proffered plea of intervention be and the same is hereby overruled for the reason and upon the ground hereinabove specified.**"

AUTHORITIES.

Crawford v. McCarthy, 148 Fed. 198;

Great Northern Ry. Co. v. Blaine County, 252 Fed. 548;

Blumenstock Bros. v. Curtis Pub. Co., 258 Fed. 927;

Nickels v. Pullman Co., 263 Fed. 551.

ARGUMENT.

The case of The Presto, 93 Fed. 522, decided by this court in 1899, is distinguishable because it is therein stated that questions other than that of the jurisdiction were involved and because the question of jurisdiction was not certified.

See comments of Judge Sanborn in Great Northern Ry. Co. v. Blaine County, 252 Fed. 548, 552.

The exception interposed to appellants' motion for leave to file the proffered intervention, hereinabove quoted, and the explicit language of the decree appealed from, hereinabove quoted, affirmatively and conclusively show that the only matter tried and decided was that of jurisdiction.

AUTHORITIES.

United States v. Jahn, 155 U. S. 109, 114;

Excelsior W. P. Co. v. Pacific Bridge Co., 185 U. S. 282, 285;

Petri v. Creelman Lumber Co., 199 U. S. 487, 492;

Smithers v. Smith, 204 U. S. 632, 641;

United States v. Larkin, 208 U. S. 332, 338;

The Steamship Jefferson, 215 U. S. 130, 138;

Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 157, 171;

United States v. Congress Construction Co., 222 U. S. 199;

Herndon-Carter Co. v. Norris, 224 U. S. 496, 498.

ARGUMENT.

In Excelsior W. P. Co. v. Pacific Bridge Co., 185 U. S. 282, 285, the court said:

> "This decree, after reciting 'that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction.' An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed 'from the final order and decree dismissing said suit for want of jurisdiction.' **This is clearly a sufficient certificate of the Circuit Court that the jurisdiction of that court was in issue, and the only question to be considered by us relates to the jurisdiction of that court.**"

In this case there was nothing to appeal from except the decree which overruled appellants' motion for leave to file their proffered bill of intervention solely on the ground that the court had no jurisdiction to entertain the same. The fact that the district court decreed that appellants' "proffered petition of intervention is not ancillary" was merely incidental to the decision that it was without jurisdiction. Nickels v. Pullman Co., 263 Fed. 551.

In the case of The Steamship Jefferson, 215 U. S. 130, a motion was made to dismiss because there was no

formal certificate. That motion was overruled, the court, page 138, saying:

> "As the foregoing considerations demonstrate that the case was dismissed below because of the conclusion that there was no jurisdiction as a Federal court over the subject-matter of the controversy, it results that the motion to dismiss is without merit."

In Davis v. C. C. C. & St. L. Ry. Co., 217 U. S. 157, 171, the court said:

> "The grounds of the motion based on the form or sufficiency of the certificate are not tenable. Even if we should admit, which we do not, that the certificate is not, as it is contended, in proper form, **the record shows clearly that the only matter tried and decided in the Circuit Court was one of jurisdiction. This is sufficient.**"

In Herndon-Carter Co. v. Norris, 224 U. S. 496, 498, the court said:

> "The appelle objects that the statutory requirement that the question of jurisdiction only shall be certified to this court was not complied with, and therefore the case should be dismissed. **The record, however, discloses that the case was dismissed for want of jurisdiction, and for that reason only. Where the decree of dismissal is in such form it is sufficient to take the place of a certificate within the requirements of the act.**"

It is therefore respectfully submited that this is a cause of which the appellate jurisdiction of the Supreme Court is exclusive, and that the appeal herein should be dismissed for want of jurisdiction.

MARSHALL SURRATT,
ETHERIDGE, McCORMICK & BROMBERG,

Solicitors for Appellees, John K. Rose, Trustee, Peter McClelland, Jr., F. M. Etheridge and J. M. McCormick.

FRANCIS MARION ETHERIDGE,
Counsel.

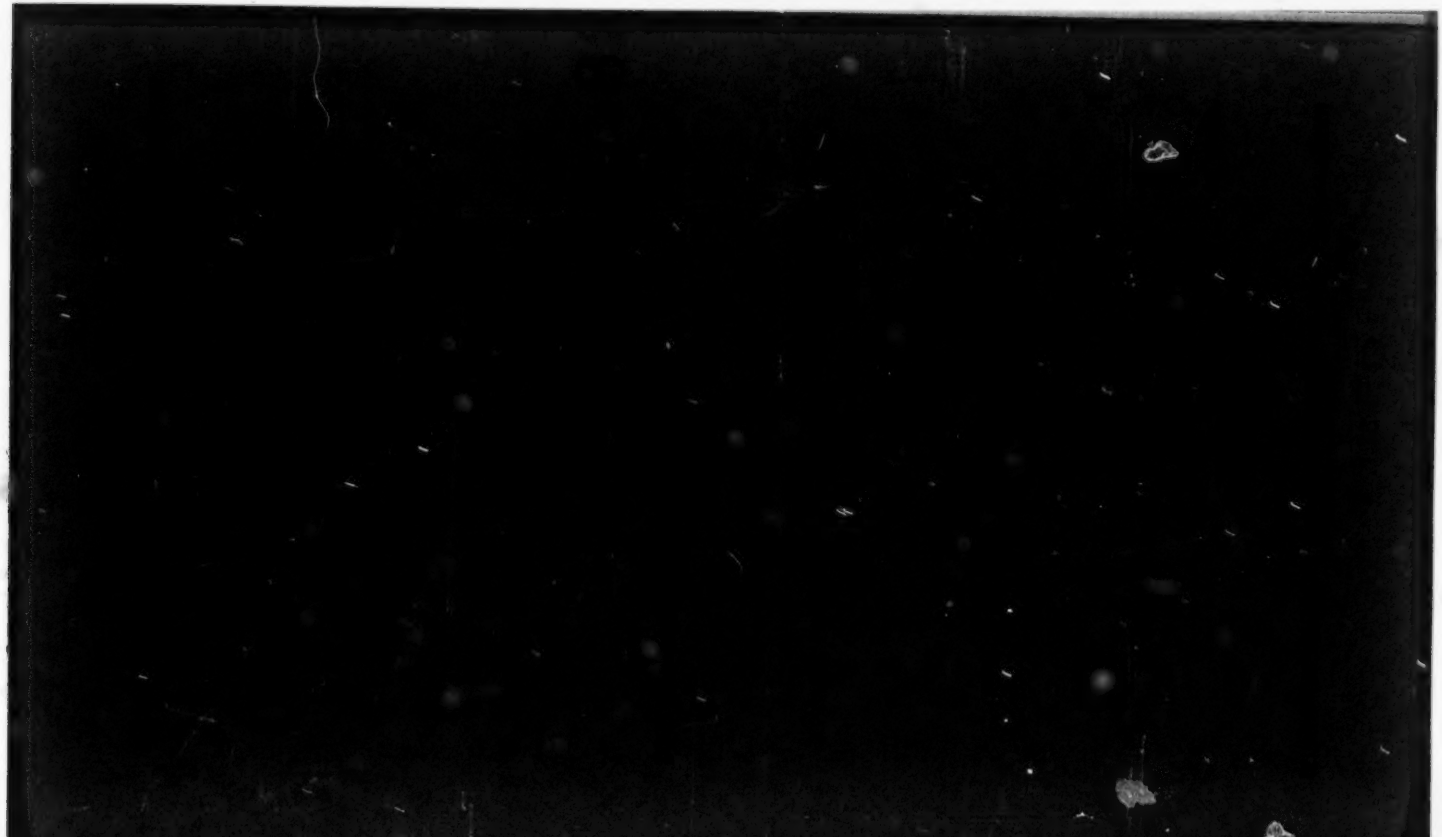


Table of Cases Cited

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IN THE

United States Circuit Court of Appeals

FOR THE FIFTH JUDICIAL DISTRICT.

W. H. HOFFMAN, ET AL.,
INTERVENORS,

Appellants,

v.

No.....

PETER McCLELLAND, JR., ET AL.,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF TEXAS,
WACO DIVISION.

BRIEF FOR APPELLANT.

GENERAL STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

On March 9, 1921, W. H. Hoffman, et al., applied to the trial court for leave to file their petition for intervention herein upon the grounds set out in their said petition. Said motion and petition was by order of the court lodged in the clerk's office; the defendants (appellees) were cited, and the motion came on for

hearing on the 19th day of November, 1921, when leave to file was denied. (Rec. pp. 144, 145, 151, 157.) Appeal was allowed, errors assigned, and bond given, and the case brought to this court. (Rec. pp. 159, 162, 166.)

THE APPELLANTS, IN THEIR SAID PETITION, ALLEGED:

I.

That these intervenors heretofore, to-wit, on or about the 24th day of May, 1915, in the District Court of McLennan County, Texas, for the 54th Judicial District, in cause No. 6258, entitled W. H. Hoffman, et al. v. Peter McClelland, Jr., recovered a judgment against said Peter McClelland, Jr., for the sum of seven thousand, five hundred and sixty-seven dollars and fifty-four cents ($7,567.54), together with interest thereon from said May 24, 1915, at the rate of six per cent per annum, and all costs of said suit, and for the foreclosure of a valid attachment lien on lots 1, 2, 3 and 4, in block 6, in the city of Waco, McLennan County, Texas, which property is located at the south corner of the intersection of Fourth and Austin streets in said city of Waco, and which lots had been levied on and attached by these intervenors as the property of said Peter McClelland, Jr.

II.

That from said judgment no appeal has ever been taken, or writ of error sued out, and that the same, said judgment, is in full force and effect, and nothing has ever been paid thereon.

III.

That on or about the 9th day of May, 1916, these intervenors, as plaintiffs in said judgment, caused an order of sale of said lots to be issued on said judgment and placed in the hands of the sheriff of said McLennan County, Texas, for execution; and that said sheriff, viz: S. S. Fleming—in obedience to said order of sale, advertised said lots to be sold on the first Tuesday in June, 1916, as the law directs. But that no sale of said lots was made under said writ (order of sale), or has ever been made, because John K. Rose, trustee, who is defendant is this cause, on or about the 31st day of May, 1916, in said District Court of McLennan County, Texas (for the 54th Judicial District), sued out an injunction restraining said sheriff and these intervenors from making such sale. Said injunction being granted in cause No. 6480, in said District Court of McLennan County, Texas (for the 54th Judicial District), entitled John K. Rose, Trustee v. W. H. Hoffman, et al., and which injunction, upon the trial of said cause No. 6480, in said district court of McLennan County, Texas, was by said court, on or about the 23rd day of October, 1918, made perpetual, because of the said court's holding and conclusion of law that the property in controversy, to-wit, the lots above described, was "a part of what is known as a spendthrift trust now being administered by John K. Rose pursuant to the provisions of the will of Peter McClelland, Sr., deceased, and that Peter McClelland, Jr., has no interest in said property which can be seized

and sold for the payment of his debts, and that John K. Rose, trustee, has authority to protect the trust estate which he is administering as well as the remaining interest of Peter McClelland, Jr., from being sold for the payment of his debts, notwithstanding the fact that the contemplated sale of the remaining estate which the defendants'' (meaning these intervenors) ''propose to make would not interfere, and would not be allowed to interfere, with the possession of John K. Rose, or with the administration of the trust that he is carrying out, during the lifetime of Peter McClelland, Jr.''

IV.

That said judgment of said district court, perpetuating said injunction, was, on appeal perfected therefrom, affirmed by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, on or about the 3rd day of December, 1919, as is fully reported in Vol. 217, pages 424-428, of the Southwestern Reporter; and that the Supreme Court of Texas has since said affirmance by said court of civil appeals refused and denied to these intervenors a writ of error to review and correct said judgment of said court of civil appeals.

So these intervenors allege and show to this court that notwithstanding the finding and holding of said district court of McLennan County, Texas, (which has been affirmed as aforesaid) that the judgment in favor of these intervenors against said Peter McClelland, Jr.,

rendered in said cause No. 6258, on to-wit; the 24th day of May, 1915, foreclosing an attachment lien on said lots 1, 2, 3, and 4, in block No. 6, in the city of Waco, McLennan County, Texas, and ordering the sale of said property to satisfy said judgment amounting to $7,567.54, was valid and binding, and that the court had jurisdiction to foreclose said attachment lien, yet said state courts, because of their holdings and conclusions first herein above set forth—in paragraph III —they, said state courts, deny to these intervenors the enforcement of their said judgment "during the lifetime of said Peter McClelland, Jr."

VI.

These intervenors plead and admit that said lots 1, 2, 3 and 4, in block 6, in the city of Waco, McLennan County, Texas, upon which they have a valid foreclosure of a valid lien for a valid and unsatisfied debt against said Peter McClelland, Jr., do constitute a part of what is known, and in these proceedings is called and referred to as the estate of Peter McClelland, Sr., deceased; and they pray that inasmuch as said lots, as a part of said estate, are now in the possession of said John K. Rose, trustee, and have been, as a part of said estate, impounded by this court by proceedings in this cause, that they, intervenors, be given by this court, that protection and relief to which they are, and shall be found to be, entitled in equity. And in this connection intervenors allege and show that said Peter McClelland, Jr., has no property within this state except that which is impounded in this cause, and under the control and subject to the orders of this court in-

cluding the said lots upon which intervenors have their said lien, and that, as already shown herein, the state courts have denied, and do deny to these intervenors the enforcement of their said judgment and lien "during the life time of said Peter McClelland, Jr." So that these intervenors are without further remedy in said courts during the life time of said Peter McClelland Jr., and will probably lose their debt and claim against said Peter McClelland Jr., unless given aid and protection by this court, and their said claim, debt and judgment against said Peter McClelland, Jr., and their said lien upon said lots be so recognized, established, maintained and preserved by order and decree of this court that said debt and judgment can and shall be collected, and their said lien enforced at the termination of said trust in said John K. Rose, to-wit, after the death of said Peter McClelland, Jr. So intervenors pray that all parties hereto, adversely interested, viz: said Peter McClelland, Jr., John K. Rose, trustee, and the attorneys of said Peter McClelland Jr.,to-wit, F. M. Etheridge and J. M. McCormick, to whom said Peter McClelland, Jr., has sold and conveyed an undivided one-third interest in the property constituting the estate of Peter McClelland, Sr., deceased, and who resides in Dallas County, Texas, be given the proper notice of this intervention, and that upon final hearing hereof that these intervenors have their rights as against said Peter McClelland, Jr., and as against said lots, upon which they have a valid foreclosure of a valid lien, protected and maintained by the proper

order and decree of this court in the exercise of its equity powers and jurisdiction: that they have judgment against said Peter McClelland, Jr., for their said debt and foreclosure, and be given such other and further relief as this court, in the exercise of its equity powers, may find them to be entitled.

And, in view of the fact that this court has held, (in its order and decree herein rendered on the 26th day of February, 1918, from which no appeal has been taken, or can be taken,) that said Peter McClelland, Jr., is subject to the trust created by the will, and codicil thereto, of Peter McClelland, Sr. deceased, as set forth in paragraph 2 of the plaintiff's original bill herein, the owner in fee of all and singular the properties and estate of the said Peter McClelland, Sr., deceased, and that "said plaintiff, Peter McClelland, Jr., is, subject to the trust aforesaid, forever quieted in his title and peace to all and singular the properties of the said Peter McClelland, Sr., deceased," these intervenors specially pray that that part of said property, upon which they have their said lien, which is not included in or embraced by said trust now being administered and executed by said John K. Rose, trustee, to-wit, the remainder in said lots now vested in said Peter McClelland, Jr., and over which said John K. Rose trustee, has no jurisdiction or control, be held and decreed to be subject to intervenors' said debt and lien, and subject to be sold in satisfaction thereof, but without disturbing or interfering with the possession of said John K. Rose, trustee, or his successors in said trusteeship,

or disturbing or interfering with the administration of said trust during the lifetime of said Peter McClelland, Jr.; and that intervenors be given such full and complete equitable relief as this court shall find them to be entitled.

In this connection the intervenors would respectfully suggest that it will be inequitable to compel them to await the collection of their said debt until the termination of said trust, now being executed by said John K. Rose, when such collection and satisfaction of their said debt can, in part at least, be effected and accomplished by a sale of the remainder in said lots now vested in said Peter McClelland, Jr., and such sale can be ordered and made without in any way interfering with the possession of the trustee during the life and continuance of the trust, and without casting any cloud upon the rights, powers, jurisdiction or authority of said trustee, or on the trust estate over which the trustee has any power, right, title or authority. All of which is respectfully submitted to this court. (Record 145-150).

APPELLEE'S PLEADINGS.

The appellees filed what they term an "Opposition" to appellant's motion (or "petition") for leave to file petition for intervention, wherein they object to sufficiency of service on Peter McClelland, Jr.; and further object to leave being granted because appellants petition of intervention is not an ancillary bill, but is an original bill, and because no federal question is involved, and because the requisite diversity of citizen-

ship does not exist. The rest of their answer or "opposition" is virtually a traversing of the allegations of the appellants, and need not be further stated here, as the trial court denied leave to file because the petition of appellants "is not ancillary but is original, and that as an original bill this court is without jurisdiction to entertain the same because no federal question is presented therein, and because the requisite diversity of citizenship does not exist."

APPELLANTS ASSIGNED ERROR AS FOLLOWS:

I.

Inasmuch as this court has held and decided in this cause, that the remainder of the property in question, after the termination of the trust in John K. Rose belongs absolutely to Peter McClelland, Jr., and it is this remainder which intervenors have levied on, and seek to hold liable for their debt against Peter McClelland, Jr., the court erred in failing and refusing to hold that intervenors have a valid lien on the interest of Peter McClelland, Jr., in the property levied on; and that the judgment of the state court foreclosing said lien is valid and binding. This holding should have been made in protection of this court's own decision and jurisdiction; and especially in view of the fact that it has been held by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, in *Lindsey v. Rose*, 175 S. W. Rep. 831, 2 (and since the holding by this court that Peter McClelland, Jr., is the absolute and only owner of the remainder in said property after the termi-

nation of the trust in John K. Rose), that said Peter McClelland, Jr., is not the owner of the said remainder in said property, but is excluded by his father's will "*from ever taking*" and that the collateral heirs of said Peter McClelland, Sr., deceased, will at the death of Peter McClelland, Jr., become the owners of said remainder, as devisees under the will of Peter McClelland, Sr., deceased; and this holding by the state court is determinedly adhered to notwithstanding the fact that this court has determined and adjudged that all such collateral heirs of Peter McClelland, Sr., deceased have no interest in or claim or title to the property left by Peter McClelland, Sr., deceased.

II.

The court should have found and held, and erred in not so doing:

(a) That the judgments and decrees heretofore rendered in this cause, and disposed of by the United States Circuit Court of Appeals, as shown opinions reported in Vol 208, page 503, and Vol. 247, page 721, of the Federal Reports, vested in Peter McClelland, Jr., a remainder in fee in the property in question, subject to the trust thereupon created by the will of Peter McClelland, Sr., deceased.

(b) That the judgment in intervenor's favor against Peter McClelland, Jr., in cause No. 6258, in District Court of McLennan County, Texas, and which was herein pleaded by intervenors, was valid and binding, and by a court of competent jurisdiction, notwith-

standing the holding by the said court of civil appeals that Peter McClelland, Jr., had no title or interest in the property levied on.

III.

The court erred in holding:

(a) That it is without jurisdiction to entertain the petition of intervenors herein, and (b) in overruling the motion to file the same, because,

(1) This court has in this cause just as far as it was and is possible to do so impounded the estate in the hands of John K. Rose, Trustee, and;

(2) Has by express order and decree retained jurisdiction of this cause for the purpose of superintending the administration of said estate, as well after as before the death of Peter McClelland, Jr., and to give other and different interpretation to said retention of jurisdiction is to invite and encourage the said collateral heirs of Peter McClelland, Sr., deceased, to attempt to take advantage of said above mentioned holdings of the Texas court of civil appeals, after the death of said Peter McClelland, Jr., and to create and cast a cloud upon all the real estate now in possession and charge of John K. Rose, trustee, and bring about protracted litigation over the same.

APPELLANT'S CONTENTIONS AND ARGUMENTS.

Appellants do not, and never did, contend that their petition, or bill, was ancillary; nor do they deny that there is want of diversity of citizenship. As to whether

or not there is a federal question presented, there may be some excuse for a diversity of opinion, but admitting there is not, still if the trial federal court has assumed control of all the property in the hands of John K. Rose, Trustee—has impounded it just as far as it has authority, or power to do so—and appellants have a lien on a part of that property which they can enforce in no other court, then the federal court should entertain this intervention and grant the relief to which intervenors are in equity entitled.

That the court has so impounded the property in the hands of the Trustee, Rose, is evidenced by its orders (1st) of February 27th, 1914 (Rec. p. 46-47), wherein it is decided "That the plaintiff (Peter McClelland, Jr.) is entitled to an account with reference to all and singular the estate of the said Peter McClelland, Sr., deceased, from the said defendant, John K. Rose, as Trustee."

> "It is further ordered, adjudged and decreed that the defendant, John K. Rose, as Trustee, be and he is hereby commanded to render unto the said plaintiff, Peter McClelland, Junior, a true, full and complete accounting and discovery of all and singular the properties, of whatsoever character and wherever situated or located, of the said estate of said Peter McClelland, Senior, deceased, as well as of his administration thereof as Trustee; and to the end that such full and complete discovery and accounting may be had A. P. McCormick, Esquire, a citizen of Waco, Texas, is hereby appointed commissioner, and he is hereby fully authorized and empowered to take testimony, to compel the attendance of witnesses and the production of documents, and to make and state unto this court, a

true, full and complete inventory and description of all and singular the properties, of whatsoever character and wheresoever situated or located, belonging to the said estates of the said Peter McClelland, Senior, deceased, and to make and state, itemized in detail, a true, full and complete statement of account between the said John K. Rose, as Trustee, and the said plaintiff as owner of the said estate; the appointment of such commissioner being, as this court now here finds, necessary and essential for that purpose." (Rec. p. 48.)

(2nd) In its order of decree of February 26th, 1918, (Record 142, 143) we read:

"It appearing to the court that the said will of the said testator creates a valid and active trust for and during the natural lifetime of the said plaintiff, Peter McClelland, Junior, and that John K. Rose is the duly appointed, qualified and acting substitute trustee under said will; and it further appearing to the court that by the terms of the codicil appended by the said testator to his aforesaid last will and testament, it is distinctly provided that, if in the judgment of the trustee the said plaintiff, Peter McClelland, Junior, should be or become, provident and careful, the trustee may make to him such advances out of the estate as he may think right and proper; and it further appearing to the court that the said estate of the said testator consists for the most part of revenue bearing real estate;

It is further ordered, adjudged and decreed by the court, that the said John K. Rose, as substitute as aforesaid, may, without further order of this court, make from time to time such advances to the said plaintiff, Peter McClelland, Junior, not to exceed the net rent revenues and income from the said estate, as he may think right and proper; but no portion of the corpus of the said estate

shall be delivered to, or be surrendered over during the lifetime of the plaintiff to the said plaintiff, or to his vendees, except upon the further order of this court; and this court hereby retains jurisdiction of this cause to the end that it may, from time to time as occasion may require, exercise its power of direction and control over said trustee in this respect; and,

It is further ordered, adjudged and decreed by the court that jurisdiction of this cause be and the same is hereby retained for the purpose of the accounting specified and provided for in the said original final decree herein rendered on February 27, 1914; and,

It is further ordered, adjudged and decreed by the court that the said plaintiff, Peter McClelland, Junior, do have and recover off and from John K. Rose as trustee, as aforesaid, all and singular, all costs by all parties hereto, expended in this suit; and the said John K. Rose, trustee, is hereby directed to make payment thereof.

Done at Waco, Texas, this the 4th day of March A. D. 1918, but as of the 26th day of February, A. D. 1918.

DUVAL WEST,
Judge of the District Court of the United States for the Western District of Texas."

The property being in the hands of a trustee regularly appointed and bonded, by a court of competent jurisdiction, and the will creating the trust, and the trust being valid, no further or more comprehensive impounding could have been made. It is as much, and as effectually impounded as is an estate being administered under supervision of a probate court. The language used in the last decree that "No portion of the corpus of the said estate shall be delivered to or

be surrendered over during the lifetime of the plaintiff, (Peter McClelland, Jr.) to the said plaintiff, *or to his vendees,* except upon the further order of this court," is a recognition of the right of Peter McClelland, Jr., to sell, subject to the trust. And if he can sell then his creditors can levy on, and have sold, *subject to the trust;* as appellants have tried to do, and as they have been denied this right, and enjoined from exercising it by the state courts, and in contravention of Peter's title, which by decree of this court—and the trial court—has been vested in him, it became the duty of the trial court—having the property completely under its control—in the exercise of its equity powers to grant to intervenors (appellants) the relief to which they show themselves, in equity, entitled.

That appellants judgment is valid and can be levied on any property of Peter McClelland, Jr., is admitted even by the state court, which in the opinion reported in Vol. 217, S. W. Rep. page 428, says: "The judgment as it stands, * * * is enforceable by execution upon any property belonging to Peter McClelland. (Jr.)" And the only reason the injunction was perpetuated was because the court inferentially held—following *Lindsey v. Rose,* 175, S. W. 832; that the property levied on does not belong to Peter McClelland, Jr. That "In the instant case we are not concerned with who shall take the estate upon the termination of the trust, except in so far as that issue involves the liability of the estate for Peter, Jr.'s debts." And further it is said in the case followed, "The fact that the

testator made a will shows that it was his intention that whoever took the remainder should take as legatee and not as heir. Peter, Jr., being *excluded* by the codicil *from ever taking.*"

That the judgment of appellants against Peter McClelland, Jr., foreclosing the attachment lien, is valid, and must be recognized as such in and by all courts (if the property levied on belonged to Peter McClelland Jr.) is established by the decision of the U. S. Supreme Court in *Arndt v. Griggs*, 134 U. S. Rep. 316. The same holding is admirably stated in *Manson v. Duncanson*, 166 U. S. page 547.

That the trial court should have allowed the appellants to intervene on an original bill—or petition—and without a federal question being presented, is held by the U. S. Supreme Court in *Gambel v. Pitkin*, 124 U. S. 131. On page 145-6 it is said "As we have already seen, and as has been many times declared by this court, the *equitable powers* of the courts of the United States sitting as courts of law, over their own process, to prevent abuse, oppression and injustice are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party." This is the equity invoked by the appellants, and which was denied them by the trial court.

On page 152, (124 U. S.) we read, "Federal and state courts are not foreign courts, or in hostility to

each other, in the administering justice between litigants. The citizen of the state in the federal court is as much in his own court as in the courts of the state. The right he has he cannot be deprived of in a federal court."

The bill, or petition, of appellants, though an original or independent bill, in one sense, is what Justice Story calls, in *Clarke v. Matthewson*, 12 Pet. 164, 172, "a dependent bill," and every principle of equity and justice calls for its allowance. If relief, —the very little relief that is asked—be denied them, then a just debt, in a valid judgment, is never to be collected though the defendant in judgment is something of a millionaire, above and beyond the small life estate held in trust by John K. Rose.

Appellants ask no more than to be treated as have been F. M. Etheridge and J. M. McCormick, grantees of Peter McClelland, Jr.

Appellants allege that Peter McClelland Jr., has conveyed to said F. M. Etheridge and J. M. McCormick an undivided one-third interest in the property constituting the estate of Peter McClelland, Jr., deceased. (Record 149) And this sale has by this court been recognized as valid in its opinion in the case of *McClelland v. Rose*, (247 Fed. Rep. 722) where said Etheridge and McCormick are referred to as "two other persons." And their rights under said conveyance are further recognized in the judgment of Feb. 26, 1918, (Record. 142, 143) where it is ordered, adjudged and decreed that, "No portion of the corpus of the said

estate be delivered to, or be surrendered over during the lifetime of the plaintiff, (Peter Jr.,) to the said plaintiff or to his vendees, *except upon the further order of this court;* etc. And it certainly will not be disputed that if Peter, Jr., can convey, then his creditors can levy on and have sold.

Of course, if this court cares to follow ~~the lead of~~ the lead of the state courts, then Peter Jr., does not own the remainder, after the termination of the trust, and his conveyance to Etheridge and McCormick is null and void, and if this be true, then it was as much the duty of John K. Rose, trustee, to bring suit to have their deed cancelled and held for naught as it was to bring the suit he did to enjoin the sale under appellants foreclosure of their attachment lien. But this court has held that Peter, Jr., does own such remainder, and his sale of one-third thereof has, by this court, been recognized as valid. The allegation by appellees (record, 153) that appellants "have been solemnly and finally adjudicated" (by the state court) "to have no lien," etc., is true, but is is also true that the same state court has "solemnly and finally adjudicated" that by his father's will Peter, Jr., has been excluded "*from ever* taking" (*Lindsey v. Rose*, 175 S. W. 832). But this court has with at least as much solemnity and finality adjudicated otherwise, and it is to this court, and not the state court, that we now appeal for what we are in equity clearly entitled. For if Peter, Jr., owns the remainder, after the termination of the trust, as this court says he does, then our levy was good;

and under foreclosure and sale we should have the same rights and protection which have been accorded "two other persons," the vendees of Peter McClelland, Jr.

The appellees further allege (record. 154) "That all the properties disposed of by the will of Peter Mc Clelland, Sr., are in the possession, custody and control, not of this court, but of John K. Rose, as trustee under the will of Peter McClelland, Sr." (The court no doubt will be thankful for this information!) Who ever heard of an estate of this kind being in tne possession, custody and control of a court except by and through some one over whose acts the court has taken control? And that the court below has taken full, comprehensive and complete control of John K. Rose, trustee, and all his acts as such trustee, is absolutely evidenced by its judgment and decree of February 26th, 1918, (record. 142, 143) and Feb. 27th, 1914. (Record. 46, 47, 48). In other words the court has impounded the estate just as far, and as completely, as it had power to do. And being so impounded, and we having a lien on a part thereof, and being without remedy elsewhere, are entitled to protection regardless of the absence of federal questions or diversity of citizenship.

One other very remarkable allegation of the appellees we ask the court to notice. In their ninth—(record, 155) they say:—

"It is manifest from an inspection of the will of Peter McClelland, Sr., which by reference is made a part of said purported bill of intervention, that none

of the property given by the testator thereby to Peter McClelland, Jr., is or ever will be subject to, but at all times remains free from the debts and liabilities of the said Peter McClelland, Jr." If Peter, Jr., got the vested remainder, (after the termination of the trust) by his father's will then this conclusion of the pleader for appellees is an absurdity; for if Peter, Jr., dies, leaving debts, all the property ~~in property~~ in the possession of John K. Rose, trustee, will "under further orders of this court" (the court below) ~~will~~ be turned over to the executors of his will, (if he dies testate, naming Etheridge and McCormick as executors, as he probably will) who will be compelled to pay such debts as he leaves out of "property given by the testator to Peter McClelland, Jr.," which property will be subject to, and will *not* remain free from the debts and liabilities of the said Peter McClelland, Jr."

But if Peter, Jr., gets by his father's will only such funds and property as the trustee may turn over to him "upon the further order of this court," (The court below record, 143) then, while the money so delivered to him by the trustee may not be reachable by his creditors, any other character of property, out of the corpus of the estate, which may be so delivered by the trustee, though given to him by his father's will, will be, and is subject to, and will not "at all times remain free from, the debts and liabilities of the said Peter McClelland, Jr."

This pleading in behalf of appellees implies a conclusion by the pleader that Peter, Jr., gets title only by

his father's will; but this court in its opinion in *McClelland v. Rose*, 208 Fed. Rep. 511, declined to determine as has the pleader, but on the contrary says:

"This contention is not material * * * as the testator died leaving the plaintiff (Peter Jr.) sole heir, and the contingency upon which the devise over depended not having occurred, and there being no other devise of the estate, if it did not pass in fee to the plaintiff by the will, subject to the trust, it so passed to him by inheritance on the testator's death." But Peter Jr., owning a vested remainder, after the termination of the trust, as this court has decided, such remainder—whether it comes to him by devise or inheritance—is subject to his debts, as per decision of the Supreme Court of Texas, *Caples v. Ward*, 179 S. W. Rep. 856.

But the state courts, overruling this court, hold that Peter Jr., has no vested remainder, or any other title either by devise or inheritance, but is "excluded by the codicil from ever taking;" and we are without remedy in the state courts, either before or after the death of Peter McClelland, Jr. Hence our appeal to this court, and our prayer for equitable relief.

We respectfully pray that the judgment and order of the court below be reversed and the cause remanded.

D A Kelly
M C H Park
Robt H Hoggs
Solicitors for W. H. Hoffman, et al, Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 190.

W. H. HOFFMAN ET AL., APPELLANTS,

vs.

PETER McCLELLAND, JR., ET AL.

BRIEF FOR APPELLANTS.

D. A. KELLEY,
ROBERT H. ROGERS,
M. C. H. PARK,
TOM CONNALLY,
Counsel for Appellants.

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No. 190.

W. H. HOFFMAN ET AL., APPELLANTS,

vs.

PETER McCLELLAND, JR., ET AL., APPELLEES.

APPELLANTS' BRIEF.

POINT I.

Appellants admit that "the question of jurisdiction alone is open to examination here."

POINT II.

Appellants take issue with appellees' Point II and say: The District Court was not "without jurisdiction to entertain appellants' proffered bill of intervention."

Authorities:

Compton *v.* Jesup, 68 Fed. Rep., 279; 15 C. C. A., 397.

Gumbel *v.* Pitkin, 124 U. S., 132.

ARGUMENT.

Appellees in their argument, under Point II, say that a
pellants contend that their bill of intervention is ancilla
Appellants deny this statement, as they have heretofore
nied it, and say: Admitting that our bill of intervention
not ancillary, that no Federal question is involved, and th
there is no diversity of citizenship, we still contend that t
court below had, and has, jurisdiction to hear and determi
our bill.

When this case was first instituted by Peter McClelland, J
against John K. Rose, trustee, the Federal court found t
property in question in the possession of the trustee, Ro
who had been appointed and bonded by a State court of co
petent jurisdiction, and in the execution of a trust whi
the Federal court found to be valid; and, having determin
that the plaintiff, Peter McClelland, Jr., is the sole own
of the property, but not entitled to the possession there
during the continuance of the trust, the court was witho
power or authority to dispossess the trustee. But inasmu
as the State courts held, and were holding, that the legal ti
was vested in the trustee, that Peter, Jr., was excluded
his father's will "from ever taking," all of which holdin
by the State courts are repeated and emphasized in the opi
ion in the case of Lindsey *v.* Rose, 175 S. W. Rep., 832,
became necessary for the Federal court to assume such a
thority and control over the trustee and his disposition of t
property after the termination of the trust as will enable sa
Federal court to see that those who, according to the holdi
of the Federal court, will take at Peter, Jr.'s, death, do
receive the same without having to litigate the ownersh

with those who the State courts hold should take. This the Federal court has done, and so effectually done that Rose, the trustee, will have to deliver the property, at the termination of the trust, to the heirs, devisees, legatees, or vendees of Peter, Jr., according to the holding and orders of the Federal court, before he can go into the State court which appointed him and ask for a discharge of himself and his bondsmen. This is as complete and as comprehensive an impounding as the Federal court can or could make. And to hold that after such impounding the Federal court cannot protect a creditor of Peter, Jr., who has a lien on a part of the impounded property and who is without remedy in any other court is to take issue with the Federal decisions cited above (Montgomery's Manual of Federal Procedure, chap. 28, secs. 730, 731, 732).

Appellees repeat, again and again, the statement that appellants have "been solemnly adjudicated by the Texas courts to have no lien." We have heretofore answered this statement by saying that the same courts have as solemnly and finally adjudicated Peter, Jr., to have no title to the property in question; that the remainder over, after the termination of the trust, will go to the collateral heirs of his father, the testator. But if Peter, Jr., owns the property, as the Federal court has solemnly and finally adjudicated, then we have a lien, and it is not to the State courts that we make our appeal.

The opinion that, inferentially, denied our lien followed the holding in Lindsey *v.* Rose, 175 S. W., 832, and, as it held that Peter, Jr., had no title to the property levied on, it repeated what was said in Lindsey *v.* Rose, to wit:

> "In the instant case we are not concerned wit
> who shall take the estate upon the termination of th
> trust, except in so far as that issue involves the lia
> bility of the estate for Peter, Jr.'s, debts."

It said further:

> "It would seem that the decision of this court i
> Lindsey *v.* Rose cannot be successfully distinguishe
> from the present case," &c.

Indeed, but for the decision in Lindsey *v.* Rose, the Stat
trial court (the District Court of McLennan County, Texas
would never have perpetuated the injunction against us, a
is clearly shown by the conclusions of said trial court, herein
after copied.

The opinion in Hoffman *v.* Rose, 217 S. W. Rep., 426
428, is the last expression by a Texas court on the question
involved in this litigation. That opinion says:

> "The findings of fact and conclusions of law by th
> trial court show all the material facts proven on th
> trial, fairly disclose the issues involved, and sugges
> the questions presented on this appeal. They ar
> therefore copied in the statement of the case, and ar
> as follows:"

> *"Conclusions of Law.*

> "(1) I find that the decree in the case of Dor
> McClelland *v.* Peter McClelland, Jr., in cause No. 75
> in this court, and reported in 37 S. W. 350, is not *re*
> *adjudicata* as against the defendants as to the issue
> involved in this present proceeding.

> "(2) That the judgments and decrees rendered i
> cause No. 8 in the case of McClelland *v.* Rose, in th

District Court of the United States for the Western District of Texas, and disposed of by the Circuit Court of the United States, as shown by the opinions reported in 208 Fed., 503; 125 C. C. A., 505, and in 222 Fed., 67; 137 C. C. A., 519, vested in Peter McClelland, Jr., a vested remainder in fee in the property in controversy, subject, however, to the trust thereupon created by the will of Peter McClelland, Sr., deceased, which is being carried out by John K. Rose, as trustee, during the life of Peter McClelland, Jr.

"(3) I find that the judgment in the defendants' favor against Peter McClelland, Jr., in cause No. 6258, shown in Exhibit C to defendants' answer herein, which was rendered on the 24th of May, 1915, foreclosing an attachment lien against lots 1, 2, 3, 4, in block No. 6, in the city of Waco, in McLennan County, Texas, and that said judgment ordering the sale of said property to satisfy defendants' debt and judgment amounting to $7,567.54, was valid and binding, and that the court had jurisdiction to foreclose said attachment lien, but that the same is not enforceable on account of what is hereinafter stated.

"(4) Referring to the case of Lindsey *v.* Rose, 175 S. W., 832, I feel that I am bound by the decision therein made, which holds that the property in controversy constitutes a part of what is known as a spendthrift trust now being administered by John K. Rose, pursuant to the provisions of the will of Peter McClelland, Sr., deceased, and that Peter McClelland, Jr., has no interest in said property which can be seized and sold for the payment of his debts, and that John K. Rose, trustee, has authority to protect the trust estate which he is administering as well as the remainder interest of Peter McClelland, Jr., from being sold for the payment of his debts, notwith-

standing the fact that the contemplated sale of the remainder estate which the defendants proposed to make would not interfere, and would not be allowed to interfere, with the possession of John K. Rose, or with the administration of the trust that he is carrying out during the lifetime of Peter McClelland, Jr.

"Feeling that I am bound by this decision, I overrule the defendants' motion to dissolve the said injunction, and direct that said injunction be made perpetual, and that an order will be enforced accordingly."

The opinion further recites:

"In cross-assignments of error appellee presents substantially two questions: First, that the judgment in cause No. 6258, Hoffman *et al* *v.* Peter McClelland, Jr., a revival of cause No. 3694, which itself revived the judgment reported in 37 S. W., 350, was void because rendered solely upon substituted service upon the defendant Peter McClelland, Jr., who was a citizen and resident of the State of California. The claim is that, the property attached not being subject to attachment, the action and judgment became *in personam*, and a personal judgment, under the service had, was void.

"Second, that the judgment in cause No. 75, in the District Court of McLennan County, and reported in 37 S. W., 350, was *res adjudicata* as to appellants, and conclusive upon them as to the issues sought to be adjudicated in cause No. 6258, in which the judgment here enjoined was rendered.

"(4) As to the first question we think it is sufficient to say that Peter McClelland, Jr., the defendant in cause No. 6258, is not a party to this suit, and is

not urging the invalidity of the judgment rendered. While no opinion is expressed as to the validity of the judgment in a direct action by Peter McClelland, Jr., to set it aside, or in an answer by him to resist its enforcement, we do not think it would have been proper for the trial court in this action, and with the parties before it, to have rendered a decree declaring the judgment void. The judgment as it stands, eliminating the property attached, is a personal judgment against Peter McClelland, Jr., and until set aside, or resisted in a proceeding to enforce it, is enforceable by execution upon any property belonging to Peter McClelland (Jr.). In these circumstances the trial court did not err in refusing to vacate and annul said judgment."

The second cross-assignment of error is also overruled, and the opinion ends with these words:

"The cross-assignments of appellee are overruled; and, finding no reversible error in the record, the judgment of the trial court is affirmed."

The two opinions, in Lindsey *v.* Rose and in Hoffman *v.* Rose, make it plain that the State courts adhere to their conclusion that Peter, Jr., has no title to or interest in the property in question which he can sell or which his creditors can have sold for his debts. Therefore, according to their holding, the deed from Peter, Jr., to Etheridge and McCormick is void. But all the Federal courts which have passed upon the question have upheld this deed to said vendees of Peter, Jr., and hold that Peter owns the absolute and perfect title to the said property, subject only to the life estate in the trustee. Our judgment, foreclosing our attachment lien, has

never been appealed from or directly attacked. The case of Hoffman *v.* Rose was in the trial court Rose *v.* Hoffman, brought by the trustee, Rose, who made Peter McClelland, Jr., a party defendant. And Peter, Jr., appeared and filed an answer, as the record in said case shows, but he never attacked our judgment or in any way resisted "a proceeding to enforce it." He retired when Rose, plaintiff, dismissed as to him. Why then is not that judgment *res adjudicata* as to him? Notice what the State court said in overruling the first cross-assignment of appellees herein:

> "Peter McClelland, Jr., the defendant in cause No. 6258, is not a party to this suit, and is not urging the invalidity of the judgment rendered. While no opinion is expressed as to the validity of the judgment in a direct action by Peter McClelland, Jr., to set it aside, or in an answer by him to resist its enforcement, we do not think it would have been proper for the trial court in this action, and with the parties before it, to have rendered a decree declaring the judgment void."

Peter, Jr., had been a party to the suit the court was deciding when it used this language and had a full and free opportunity to "resist a proceeding to enforce" said judgment. He saw fit not to do so. It is too late now for him to say the same is not *res adjudicata* as to him. And we here repeat what we have said before, that the judgment is valid and must be recognized as such by all courts—if the property levied on belonged to Peter, Jr.—is established by the opinion of the Supreme Court of the United States in Arndt *v.* Griggs, 134 U. S., 316, and in Manson *v.* Duncanson, 166 U. S., 547.

Point III.

Appellees' Point III, which is in these words,

> "The lots appellants attempted to sell, in pursuance of their default judgment purporting to foreclose an attachment lien, were not in the custody and control of the trial court,"

is answered by the judgments and decrees of the trial court, which are in the record. But is this a question really before this court? In their Point I, the appellees say "the question of jurisdiction alone is open to examination here." The court below dismissed our bill, because (as the record shows) the trial court did not think our bill showed jurisdiction. But it was our allegation of impounding that the court was passing upon, not the fact of impounding, which may be shown by other evidence than that contained in the record before this court, which is but a small part of the records on file in the court below. We, however, contend that even the record before this court abundantly shows an impounding.

While the court has no authority to destroy the trust in Rose, it has the authority to recognize and has recognized the right of Peter, Jr., to sell subject to that trust, and it should and must recognize the right of his creditors to sell in like manner, subject to the trust and without disturbing the possession of the trustee during the continuance of the trust. And holding, as it does, that Peter, Jr., is the sole and only beneficiary of the trust, it has assumed the jurisdiction and power to protect his devisees and heirs, as well as his vendees, against the collateral heirs of his father by controlling the disposition of the property to be made by the trustee after

the termination of the trust. It has even gone further and ordered and decreed that "no portion of the *corpus* of the said estate shall be delivered to or be surrendered over during the lifetime of the plaintiff (Peter, Jr.) to the said plaintiff or to his vendees, *except upon the further order* of this court.

These orders and decrees, if they mean anything, mean that the court has assumed control of the trustee and of the estate he holds in trust, both during and after the termination of the trust. What, then, is to prevent the court from ordering the trustee to pay off a lien-secured debt of Peter, Jr.'s, if this can be done out of the surplus income from the estate over and above what is necessary to support Peter in luxury? (After properly preserving the estate.)

It is contended by appellees that this case, No. 8, equity, in the court below "was an action in equity by Peter McClelland, Jr., against Rose, trustee, and the collateral heirs of the testator (his father) to remove the cloud cast by the claim of the collateral heirs." The record shows that it was more, for Peter, Jr., sued to recover both title and possession from the trustee. He succeeded in recovering title, though the possession was left with the trustee. And, having recovered title, he should not be allowed to successfully defy his creditors in their attempt to subject that title to the payment of his debts without in any way disturbing the trust or the trustee in its execution.

Appellees further contend that "the old suit, No. 8, in equity, Peter McClelland, Jr., plaintiff, *v.* John K. Rose, trustee, *et al.*, defendants, had terminated," and that "there was no suit pending in which appellants could intervene at the time they attempted to do so."

This is virtually a cross-assignment of error and should be presented as such. The court below took a very different view, as is shown by its order allowing us to present the bill of intervention and in dismissing the same for quite a different reason.

D. A. KELLEY,
ROBT. H. ROGERS,
M. C. H. PARK,
TOM CONNALLY,
Solicitors for W. H. Hoffman et al., Appellants.

[Endorsed:] Supreme Court of the United States. No. 190. W. H. Hoffman *et al. v.* Peter McClelland, Jr., *et al.* Appellants' brief.

SUPREME COURT OF THE UNITED STATES

NO. 78[illegible] 190

W. H. HOFFMAN, D. A. KELLEY,
ROBERT H. ROGERS ET AL, Appellants,

v.

PETER McCLELLAND, Jr., J. M. McCORMICK,
F. M. ETHERIDGE ET AL, Appellees.

BRIEF FOR APPELLEES.

MARSHALL SURRATT, Waco, Texas;
FRANCIS MARION ETHERIDGE, Dallas, Texas;
JOSEPH MANSON McCORMICK, Dallas, Texas;
Solicitors for Peter McClelland, Jr., et al., Appellees.

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NO. 783.

W. H. HOFFMAN, D. A. KELLEY,
ROBERT H. ROGERS ET AL, Appellants,

v.

PETER McCLELLAND, Jr., J. M. McCORMICK,
F. M. ETHERIDGE ET AL, Appellees.

BRIEF FOR APPELLEES.

POINT I.

The district court denied appellants leave to file their proffered bill of intervention (Record 145 to 151) solely on the ground that it had no jurisdiction to entertain it (Record 157 and 158), and the question of jurisdiction alone is open to examination here.

AUTHORITIES.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429;
Hennessy v. Richardson Drug Co., 189 U. S. 25.

POINT II.

The district court was without jurisdiction to entertain appellants' proffered bill of intervention.

AUTHORITIES.

Montgomery v. McDermott et al., 99 Fed. 502, S. C. 103. Fed. 801;
Case v. Beauregard, 101 U. S. 688;
Hoffman et al. v. Rose, 217 S. W. 424.

ARGUMENT.

Appellants' proffered bill of intervention (Record 145 to 151) affirmatively shows that appellants, Hoffman, Kelley, Rogers, Herring, and appellee, Rose, are citizens of McLennan County, Texas; and that appellees, Etheridge and McCormick, are citizens of Dallas County, Texas, and that appellants, Laura Belle Bagby and W. H. Bagby, and appellee, McClelland, are citizens of Los Angeles County, California. There is, therefore, no diverse citizenship.

Appellants' proffered bill of intervention does not set up any federal question. Therefore, if appellants' proffered bill of intervention be deemed an original bill, clearly the district court was without jurisdiction to entertain it. Appellants, however, contend that the properties involved in the old case, No. 8 in Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, in the trial court were in the custody of that court, and that they had a lien upon some of the properties involved in that suit, and that, therefore, their proffered bill of intervention is ancillary, and not original;

whereas appellees' contention is that appellants' proffered bill of intervention affirmatively shows that appellants had been solemnly adjudicated by the Texas courts to have no lien, and that they are merely seeking to relitigate in the federal court that which they had litigated in the state court and which the state court had solemnly adjudicated against them.

The said proffered bill of intervention, by express reference in paragraph IV thereof (Record 147), incorporates therein and makes a part thereof the decision of Hoffman et al. v. Rose by the Court of Civil Appeals of Texas, as reported in 217 S. W., pp. 424 to 428. That decision affirmatively discloses that appellants obtained a judgment by default upon substituted service against appellee, Peter McClelland, Jr., in the state district court for $7,567.54, with a foreclosure of an attachment lien on Lots 1, 2, 3 and 4 in Block 6 in the City of Waco, McLennan County, Texas; that appellants caused an order of sale to be issued upon said default judgment and to be placed in the hands of the sheriff, and that the sheriff was proceeding to execute the same by a sale of said lots thereunder, and that appellee, Rose, as trustee, on May 31, 1916, sued out an injunction in said state district court restraining said sheriff and appellants from making the threatened sale. That injunction was perpetuated, and appellants appealed to the Court of Civil Appeals, which affirmed the decree on the ground that appellee, Peter McClelland, Jr., against whom the said default judgment was rendered, owned no such interest in the lots in question as was subject to attachment, and that appellants did not acquire any lien whatsoever on said lots by virtue of

the levy of the attachment and the default judgment purporting to foreclose the purported attachment lien. The proffered bill of intervention further shows, in paragraph IV thereof (Record 147), that appellants applied to the Supreme Court of Texas for a writ of error to review the said judgment of the said Court of Civil Appeals, and that their application was refused. It, therefore, affirmatively appears from appellants' proffered bill of intervention that the Texas courts, from the lowest to the highest, having jurisdiction of the parties and the subject matter, had solemnly adjudged appellants to have acquired no lien, and that they had been perpetually enjoined from any attempt to make any sale under their aforesaid default judgment purporting to foreclose the purported attachment lien.

Paragraph V of appellants' proffered bill of intervention (Record 147 and 148) avers that "said State Courts, deny to these intervenors the enforcement of their said judgment **'during the lifetime** of said Peter McClelland, Jr.' ". The same averment is made in paragraph VI thereof (Record 148). Such averment is without foundation in fact and is contradictory of the adjudication made by the state court. The injunction issued by the state court, at the instance of Rose, Trustee, against appellants and the said sheriff, which was perpetuated and its perpetuation approved by the Supreme Court of Texas, was comprehensive, wholly without reservation, and is such as to preclude the possibility of any contention by appellants that they acquired any sort of lien or right whatsoever in virtue of their purported attachment proceedings either "during the lifetime" or **after the death** of said Peter McClelland, Jr.

In Montgomery v. McDermott, *supra*, Judge Coxe pertinently said:

> "If no attachment had been issued in the action at law it is manifest that there would be nothing on which to base the action in equity. It is only because of the lien alleged to have been acquired that the aid of equity is invoked. If the complainant had no lien there is nothing for equity to aid. The mere fact that an attachment issued is of no consequence unless it fastened itself upon some property of the defendant and impounded it so that the plaintiff could reach it if he obtained a judgment. The state court has decided that the attachment was inoperative in that it gave the complainant no lien, and this court has decided that none of the parties to the action in the state court can relitigate that question. As to them it is a closed book, the estoppel is complete."

Again Judge Coxe said:

> "The theory of the bill, as before stated, is that the complainant needs the assistance of a court of equity to enforce his lien; there being no lien, there is nothing which a court of equity can aid, it is without jurisdiction."

Again Judge Coxe said:

> "It (this action) rests upon the foundation that, irrespective of the citizenship of the parties, the court has obtained jurisdiction of the subject of the litigation, having acquired control of the fund in controversy in an action at law in which further proceedings are impossible. This is the cause of action presented by the bill and on this theory the demurrer was overruled. Remove the foundation on which it rests and the action must fall. The lien is gone, or, at least,

the complainant cannot assert its existence, and it is not easy to see how the bill can be retained or transferred so as to afford any relief to the complainant. It will hardly be maintained that this court could have obtained jurisdiction for any purpose if the suit at law had not been begun against McHenry, for the reason, among others, that no federal question is involved in the controversy between the complainant Dunning and the trustees and they are all citizens of the same state. The pendency in this court of a naked action of assumpsit which has become inoperative, does not confer jurisdiction over a subsequent action in equity relating to the same subject-matter. In brief, the court is constrained to hold that this is not an ancillary action and that no other ground of federal cognizance is stated. The bill must be dismissed."

Appellants aver in paragraph VI of their proffered bill of intervention that the properties known "as the estate of Peter McClelland, Sr., deceased", of which the lots in question are a part, have been "impounded by this court by proceedings in this cause". If the lots in question were in the custody and under the control of the court *a quo*, then the purported attachment of them by the issuance of a writ of attachment out of the state court and the levy thereof at the instance of appellants was contemptuous and in disregard of the alleged fact that said lots were in *custodia legis*, and appellants could not acquire a lien on said lots by such contemptuous levy.

It is therefore respectfully submitted that, from any view of the cause, the irresistible conclusion is that appellants acquired no lien whatsoever upon said lots and that therefore they could not maintain their proffered bill of intervention as an ancillary proceeding, and that,

as an original proceeding, the trial court had not jurisdiction because of the absence of any federal question and the lack of diverse citizenship. It is therefore respectfully submitted that the trial court had not jurisdiction to entertain appellants' proffered bill of intervention, and that the judgment should be here affirmed.

POINT III.

The lots appellants attempted to sell, in pursuance of their default judgment purporting to foreclose an attachment lien, were not in the custody and control of the trial court.

AUTHORITIES.

Hart v. Sansom, 110 U. S. 151.

ARGUMENT.

The old suit, No. 8 In Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, had terminated by a final decree rendered on February 27, 1914, (Record 45 to 49) and by a supplemental decree rendered March 4, 1918, (Record 132 to 143) against additional parties who sought to relitigate the question in the state court. Rose was appointed by the state court, not by the federal court, as a substitute trustee to succeed Prather, the last surviving trustee of the testator's selection (Record 16 to 20), and the trial court had no property of the testator, Peter McClelland, Sr., in its custody, nor was it, through Rose, as substitute trustee, or other-

wise, administering any of such property. These facts are manifest from an inspection of said decrees and from the reported decisions of the Circuit Court of Appeals in the previous litigation relative to the construction of the will of Peter McClelland, Sr., 208 Fed. 503; 222 Fed. 67; 247 Fed. 721, Certiorari denied, 241 U. S. 668.

The fact that the decree of February 27, 1914, ordered an accounting and appointed A. P. McCormick, Esquire, commissioner to take and report such accounting (Record 48), and the further fact that, by the supplemental decree of March 4, 1918, (Record 143) jurisdiction was retained for the purpose of the accounting provided for by the previous decree, are wholly immaterial because the order for an accounting cannot be tortured into the equivalent of seizing or taking the property into custody or of administering the same; and, because, presumably, such accounting was long since had, or rendered unnecessary by a voluntary and satisfactory accounting by the trustee. At all events, there is no allegation in appellants' proffered bill of intervention to the effect that such accounting had not long since been made (Record 145 to 151).

The further fact that the supplemental decree of March 4, 1918, provided that Rose, as substitute trustee, might, without further order of the court, make from time to time such advances to Peter McClelland, Jr., not to exceed the net income of the estate, as he might think right and proper, but that no portion of the *corpus* of the said estate should be surrendered to him during his life-

time, or to his vendees, except upon the further order of the court, is but a mere construction of the terms of the will of Peter McClelland, Sr., and is in no sense the equivalent of the seizure, custody or administration of the property by the trial court. The previous litigation was between Peter McClelland, Jr., as plaintiff, and Rose, trustee, and certain individuals composing the class denominated by the testator as "my heirs at law" as defendants. The collateral heirs, those designated by the testator as "my heirs at law", were claiming that upon the death of Peter McClelland, Jr., they would take, whereas Peter claimed that the executory devise to the collateral heirs was upon a contingency that could never happen and that they therefore had no interest in the estate of the testator, either under the will or under the statute, and that, subject to the trust, he was the sole beneficial owner. That litigation had terminated long prior to the time appellants sought leave to file their proffered bill of intervention, by the decree of February 27, 1914, (Record 45 to 49) and by the supplemental decree against additional members of the class known as "my heirs at law" rendered March 4, 1918 (Record 132 to 143), by which it was finally and conclusively adjudged that the collateral heirs of the testator took no interest whatsoever. The original litigation involved only this, nothing more. It was an action in equity by Peter McClelland, Jr., against Rose, trustee, and the collateral heirs of the testator to remove the cloud cast by the claim of the collateral heirs. It was therefore an action purely *in personam* and not *in rem*. Hart v. Sansom, *supra*. It

was not an action in which a fund was brought into court for administration and distribution among creditors, nor one for the use and benefit of creditors or third persons; and, insofar as strangers thereto, in which category are appellants, are concerned, that litigation was finally closed, and there was no suit pending in which appellants could intervene at the time they attempted to do so.

Even if the original suit, No. 8 In Equity, Peter McClelland, Jr., plaintiff, v. John K. Rose, Trustee, et al., defendants, were pending, and even if in that suit the trial court had custody of the property of the testator, Peter McClelland, Sr., that would not aid appellants because, having been adjudged by the state courts to have no lien, their proffered bill of intervention could not be ancillary, and the trial court had no jurisdiction to entertain it.

It is therefore respectfully submitted that the decree of the trial court should be affirmed.

MARSHALL SURRATT, Waco, Texas;
FRANCIS MARION ETHERIDGE, Dallas, Texas;
JOSEPH MANSON McCORMICK, Dallas, Texas;
Solicitors for Peter McClelland, Jr., et al., Appellees.

HOFFMAN ET AL. *v.* McCLELLAND, JR., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 190. Argued January 23, 1924.—Decided April 21, 1924.

1. A decree of the District Court refusing leave to file a bill of intervention upon the theory that there is no basis on which the court, as a federal tribunal, could adjudicate the matter presented by it, rests on a jurisdictional ground and is appealable directly to this Court under Jud. Code, § 238. P. 557.
2. Where, in the progress of a suit in a federal court, property has been drawn into the court's custody and control, third persons claiming interests in or liens on the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims, although the court could not consider their claims if it had not impounded the property. P. 558.
3. But this rule does not apply, where the court has not impounded the property in question but has merely adjudicated a controversy concerning it and retained jurisdiction of the suit to insure obedience to its decree. P. 559.

Affirmed.

APPEAL from a decree of the District Court refusing leave to file a petition of intervention, for want of jurisdiction. The appeal was first taken to the Circuit Court of Appeals and was transferred to this Court under Jud. Code, § 238a. See the opinion of the Circuit Court of Appeals, reported in 284 Fed. 837.

Mr. Tom Connally, with whom *Mr. D. A. Kelley, Mr. Robert H. Rogers* and *Mr. M. C. H. Park* were on the brief, for appellants.

Admitting that our bill of intervention is not ancillary, that no federal question is involved, and that there is no diversity of citizenship, we still contend that the court below had, and has, jurisdiction.

When this case was first instituted by Peter McClelland, Jr., against John K. Rose, trustee, the federal court found the property in question in the possession of the trustee, Rose, who had been appointed and bonded by a state court of competent jurisdiction, and in the execution of a trust which the federal court found to be valid; and, having determined that the plaintiff is the sole owner of the property, but not entitled to the possession thereof during the continuance of the trust, the court was without power or authority to dispossess the trustee. But inasmuch as the state courts held, and were holding, that the legal title was vested in the trustee, that the plaintiff was excluded by his father's will "from ever taking," which holdings by the state courts are repeated and emphasized in the opinion of the case of *Lindsey* v. *Rose*, 175 S. W. 832, it became necessary for the federal court to assume such authority and control over the trustee and his disposition of the property after the termination of the trust as will enable the federal court to see that those who, according to its holding, will take at plaintiff's death, receive the same without having to litigate the ownership with those whom the state courts hold entitled. This the federal court has done, and so effectually done that Rose, the trustee, will have to deliver the property, at the termination of the trust, to the heirs, devisees, legatees, or vendees of plaintiff, according to the holding and orders of the federal court, before he can go into the state court which appointed him and ask for a discharge of himself and his bondsmen. This is as complete and as comprehensive an impounding as the federal court could make. And to hold that after such impounding the federal court cannot protect a creditor of plaintiff, who has a lien on a part of the impounded property and who is without remedy in any other court, is to take issue with the federal decisions. *Compton* v. *Jesup*, 68 Fed. 279; *Gumbel* v. *Pitkin*, 124 U. S. 131.

The court below dismissed our bill, because (as the record shows) the court did not think our bill showed jurisdiction. But it was our allegation of impounding that the court was passing upon, not the fact of impounding, which may be shown by other evidence than that contained in the small part of the record before this Court. We, however, contend that even the record before this Court abundantly shows an impounding.

While the court has no authority to destroy the trust in Rose, it has the authority to recognize, and has recognized, the right of plaintiff, to sell subject to that trust, and it should and must recognize the right of his creditors to sell in like manner, subject to the trust and without disturbing the possession of the trustee during the continuance of the trust. And holding, as it does, that plaintiff is the sole and only beneficiary of the trust, it has assumed the jurisdiction and power to protect his devisees and heirs, as well as his vendees, against the collateral heirs of his father by controlling the disposition of the property to be made by the trustee after the termination of the trust. It has even gone further and ordered and decreed that "no portion of the *corpus* of the said estate shall be delivered to, or be surrendered over during the lifetime of the plaintiff to the said plaintiff, or his vendees, except upon the further order of this court."

These orders and decrees, if they mean anything, mean that the court has assumed control of the trustee and of the estate he holds in trust, both during and after the termination of the trust.

Mr. Joseph Manson McCormick, with whom *Mr. Marshall Surratt* and *Mr. Francis Marion Etheridge* were on the brief, for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is an appeal from a decree of the District Court for the Western District of Texas refusing leave to file a bill proffered as a petition of intervention in a designated suit in that court. The appeal was taken to the Circuit Court of Appeals and was by that court transferred here according to § 238a of the Judicial Code, c. 305, 42 Stat. 837, on the ground that it should have been taken directly to this Court under § 238. 284 Fed. 837.

The suit in which intervention was sought already had been prosecuted to a final decree; but the decree contained a provision whereby jurisdiction was retained for limited purposes, one of which will be hereinafter shown. The suit arose out of conflicting claims asserted under the will of Peter McClelland, Sr., a resident of McLennan County, in the Western District of Texas, who died in 1886 seized of valuable real property in that county. The will put the property in a so-called spendthrift trust of which Peter McClelland, Jr., the testator's son and only child, was the beneficiary. Through an order of the state court in McLennan County, John K. Rose, a citizen of Texas, became the substituted trustee under the will, and as such was holding the property and administering the trust when the suit was begun. The son, who was a citizen of California, was the plaintiff, and the substituted trustee and the testator's collateral kin were the defendants. Diverse citizenship was the sole basis of the District Court's jurisdiction. The object of the suit was to obtain a construction of the will, to have that construction made binding on the trustee, and to establish the son's ownership, subject to the trust, of all the property as against the collateral kin. The proceedings and the decree are shown in *McClelland* v. *Rose,* 208 Fed. 503; 222 Fed. 67; and 247 Fed. 721; and *Rose* v. *McClelland,* 241 U. S. 668. The decree determined that the trust was to con-

tinue for the natural life of the son; that the trustee was to hold the property, collect the rents and make discretionary advances to the son during that period, and that the son was the true and sole owner, subject to the trust, of all the property. One paragraph of the decree read as follows:

"It is further ordered, adjudged and decreed by the court, that the said John K. Rose, as substitute trustee aforesaid, may, without further order of this court, make from time to time such advances to said plaintiff, Peter McClelland, Jr., not to exceed the net rent revenues and income from the said estate, as he may think right and proper; but no portion of the corpus of the said estate shall be delivered to, or be surrendered over during the lifetime of the plaintiff to the said plaintiff, or his vendees, except upon the further order of this court; and this court hereby retains jurisdiction of this cause to the end that it may, from time to time as occasion may require, exercise its power of direction and control over said trustee in this respect."

The persons who sought to intervene were creditors of the son, and were citizens of Texas. They had brought an action on their claim in the state court for McLennan County, had caused a writ of attachment to be issued in that action and levied on part of the real property in the possession of the trustee, and had prosecuted the action to a judgment directing that the son's interest in the attached property be sold to satisfy their claim. The son had not been served with process in that action, nor had he appeared therein; so the judgment had no force save such as may have arisen from the attachment. Afterwards, in a suit by the trustee against the attaching creditors and the sheriff, the same state court granted a permanent injunction against a sale under the judgment,—the grounds assigned for granting the injunction being that the son's interest in the property could not be

sold to pay his debts while he was living, and that the trustee was entitled to prevent such a sale in the son's lifetime, even though there was no purpose to disturb the trustee's possession or the administration of the trust. On an appeal to the Court of Civil Appeals that decision was affirmed, *Hoffman* v. *Rose*, 217 S. W. 424, and an application for a further review was denied by the Supreme Court of the State.

It was after these proceedings that the creditors sought to intervene in the suit in the District Court. They set forth in their proffered bill all that was done in the state court, including the attachment and judgment and the subsequent injunction, and also alleged that by the attachment and judgment they had acquired a lien on the attached property which was in no way avoided or affected by the injunction; that by the prior proceedings in the District Court the property had been drawn into that court's custody and control and thereby effectually impounded; that they had no means of enforcing their lien during the life of the son, save through the interposition and aid of the District Court; that the lien probably would be lost unless that court recognized and protected it, and that to postpone its enforcement until after the death of the son would not be equitable. The relief prayed was that the lien be recognized and protected and the remainder interest of the son in the attached property be ordered sold under the lien to satisfy their claim.

In refusing leave to file the bill the District Court put its decision on the ground that it was without jurisdiction to entertain the bill in that (a) the bill was not ancillary or dependent in the sense that it could be entertained in virtue of the jurisdiction acquired in the earlier suit, and (b) the citizenship of the parties and the nature of the matter presented were not such that the bill could be dealt with as an original and independent bill.

As leave to file the bill was not refused as a matter of discretion but on the theory that there was no basis on

which the court, as a federal tribunal, could proceed to an adjudication of the matter presented, it is apparent that the petitioning creditors were shut out on a jurisdictional ground in the sense of §238 of the Judicial Code, and so were entitled to bring that ruling here for review by a direct appeal.

The record makes it plain and counsel agree that there was an absence of jurisdictional requisites for dealing with the bill as an original and independent bill; so we come at once to the question whether it could be entertained as an ancillary or dependent bill.

It is settled that where in the progress of a suit in a federal court property has been drawn into the court's custody and control, third persons claiming interests in or liens upon the property may be permitted to come into that court for the purpose of setting up, protecting and enforcing their claims,—although the court could not consider or adjudicate their claims if it had not impounded the property. Power to deal with such claims is incident to the jurisdiction acquired in the suit wherein the impounding occurs, and may be invoked by a petition to intervene *pro interesse suo* or by a dependent bill. But in either case the proceeding is purely ancillary. *Oklahoma* v. *Texas*, 258 U. S. 574, 581; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 632; *Krippendorf* v. *Hyde*, 110 U. S. 276, 281; *Compton* v. *Jesup*, 68 Fed. 263, 279; *Sioux City Co.* v. *Trust Co.*, 82 Fed. 124, 128; *Minot* v. *Mastin*, 95 Fed. 734, 739; Street Fed. Eq. Pr. §§ 1229, 1245–1247, 1364.

The proffered bill shows that it was drafted to obtain the benefit of that rule, and, if its allegations were all that could be considered, there might be good ground for thinking it could be entertained in virtue of the jurisdiction acquired in the earlier suit. But the bill did not rightly state the nature and effect of the proceedings in that suit; and of course the District Court could not accept a mistaken description or characterization of them,

but was required to give effect to what its own records disclosed. The pleadings, orders and decree in that suit, which were before the court at the time, are set forth in the present record, and they show that the property was not impounded in that suit. The trustee, who was holding the property and administering the trust, was not an appointee of the District Court but of the state court of McLennan County. The District Court had not taken over the administration of the trust, nor had it otherwise drawn unto itself the custody and control of the property. It had determined a controversy between the son on the one hand and the trustee and the collateral kin on the other respecting the nature and duration of the trust; had adjudged that, subject to the trust, the son was the true and sole owner of the property and that the collateral kin had no interest therein; had prohibited the trustee from delivering or surrendering any part of the corpus of the estate to the son, or his vendees, during his lifetime, except on its order; and had retained jurisdiction of the suit to the end that it might compel full adherence to that prohibition. But it did not acquire or assume any other power of direction or control over the property, nor did it withdraw the son's remainder interest in the property from the reach of process issuing from other courts. The petitioning creditors evidently proceeded on this view throughout the proceedings in the state court, for they not only caused a part of the property to be attached under process issued from that court but sought to have the son's remainder interest in it sold under such process without asking the leave of the District Court. True, the sale was prevented by an injunction, but that was because the state court which granted the injunction was of opinion that under the provisions of the will such a sale during the son's life would be inadmissible and ineffectual, and not because it regarded the property as impounded by the proceedings in the District Court. Only after they had

met with that decision in the state court did the creditors conclude to resort to the District Court. Even if that decision was wrong, as they seem to think, it did not change or affect the situation in the District Court.

In our opinion the bill could not be entertained as an ancillary or dependent bill.

Judgment affirmed.